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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

MICHAEL B. ANDERSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense and the Secretaries of the Army, Navy and Air Force, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (Appendix A, *infra*, pp. 1a–69a) are not yet reported. The opinion of the district court (Appendix B, *infra*, pp. 70a–93a) is reported at 316 F.Supp. 1081.

JURISDICTION

The judgment of the court of appeals (Appendix C, *infra*, p. 94a) was entered on June 30, 1972. On September 19, 1972, the Chief Justice extended the time for filing a petition for a writ of certiorari to and in-

cluding October 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether regulations of the three federal military academies requiring attendance of cadets and midshipmen at Protestant, Catholic or Jewish chapel services each Sunday violate the Establishment or Free Exercise Clauses of the First Amendment.

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The pertinent regulations of the Service Academies are set out in footnote 4 *infra*, p. 5.

STATEMENT

Respondents are two cadets at the United States Military Academy at West Point, New York, and nine midshipmen at the United States Naval Academy at Annapolis, Maryland. They brought this suit as a class action on behalf of all cadets and midshipmen at the three federal military academies, seeking declaratory and injunctive relief against regulations requiring cadets and midshipmen to attend Protestant, Catholic or Jewish chapel services each Sunday.

1. THE SERVICE ACADEMIES AND THE CHAPEL REGULATIONS

The training of cadets and midshipmen at the Service Academies is a military activity ofthe United States

government. The purposes and methods of the academies are not comparable to those of any civilian educational institution. As stated by General Koster, Superintendent of West Point, "The United States Military Academy accepts responsibility for the total development of a cadet: mental, physical, and moral" (App. 30).[1] Their methods, in addition to academic studies, include the Honor Code, mandatory athletic training, compulsory military drills and pervasive military discipline.[2]

The all-encompassing character of the academies' programs stems from the "unlimited" (5 Tr. 43) responsibilities of the command positions for which the cadets and midshipmen are being trained. As Admiral Thomas H. Moorer, then Chief of Naval Operations and later Chairman of the Joint Chiefs of Staff, testified (6 Tr. 187–189):

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[1] "App." refers to the Appendix in the Court of Appeals. "—Tr.—" refers to the volume and page of the ten volume transcript of the proceedings below ("A Tr.—" refers to a specially prepared volume coming between volumes 1 and 2).

[2] The importance of discipline in the academies' program was stressed by Roger T. Kelley, Assistant Secretary of Defense in charge of manpower:

"Understanding the conditions under which they operate, there are very many actions, very many decisions made for the midshipmen and cadets in the course of his four years at the service academy. In the process of following authority and following rules prescribed by others and practices laid down by others in authority, a midshipman and cadet learns to follow and in the course of learning to follow, he begins to form a foundation for knowing how to lead.

"In the course of following certain rules and practices which he may find personally onerous or disagreeable at the time, there is instilled in the individual a devotion to the service which he nominated himself for in full knowledge of the rules and the conditions that were to be imposed on him" (6 Tr. 34).

> The responsibility and, indeed, accountability of every commander is to insure that he puts forth every effort to protect and enhance the welfare of the personnel under his command. * * * He must look on each man as an individual and make certain that the needs, the welfare and the desires of each individual are taken into account when he issues orders, establishes routines or takes any action which would [have] impact on the day-to-day life of the individual concerned. * * * [Ultimately] leadership is the art or technique of influencing an individual or a group of individuals to work together towards the achievement of a common goal; and you will not get this kind of effort and this working together unless the individuals in the command have the utmost confidence that the commander recognizes them as individuals and will take every action in his power to see to it that their welfare, * * * their desires and their needs are always considered when he gives an order.

A commander's responsibilities may include, particularly in combat and crisis situations, attending to the spiritual needs of his men.[3] The academies therefore attempt to develop in cadets and midshipmen a

[3] Admiral Moorer noted the special responsibilities of commanders during crises (6 Tr. 205):

"[In] a crisis situation, different men react in different ways, and it is very important that the commander * * * understands why the various men in his command will react in a different way, and why some of them find a need to resort to religion to support them in this time of extreme danger and extreme trial. And unless he understands that many people have this feeling and have this need to resort to their religious beliefs to provide strength to them in this period of crisis, he cannot properly * * * handle this crisis situation."

respect for, an understanding of, and a sensitivity to religion and the religious feeling of others (A Tr. 5, 11, 13; 2 Tr. 106–107, 120, 126–130, 138; 5 Tr. 27–28, 41–43, 71, 111–112, 122–123, 140; 6 Tr. 191, 211, 229).

In recognition of these responsibilities the academies require cadets and midshipmen to attend a religious service each Sunday as part of their overall training. As General Koster stated: "In recognition of this responsibility [of the total development of a cadet], the fact that moral values are the foundation stone of honor and integrity, and the necessity for every officer to have a first-hand knowledge of the religious traditions of our country, the Academy requires each cadet to attend Protestant, Catholic or Jewish chapel on Sunday" (App. 30).[4]

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[4] The West Point regulation provides:

"Attendance at chapel is part of a cadet's training; no cadet is exempt. Each cadet must attend either the Cadet Chapel, Catholic Chapel or Jewish Chapel service each Sunday, according to announced schedules." [Regulations for the United States Military Academy Chapter 8, Section IV, ¶819.]

The Naval Academy regulation provides:

"1. The basic requirements concerning religious matters at the Naval Academy are:

"(a) All midshipmen will attend church or chapel services on Sunday mornings but are required to attend at no other times." [Part II, Chapter 15, § 1501 of the United States Naval Academy Regulations.]

The Air Force Academy regulation provides:

"Attendance at an established church service is mandatory for those Second, Third and Fourth Classmen present for duty in the Cadet Area." [Air Force Cadet Regulation No. 265–1.]

The Naval and Air Force Academies also permit their midshipmen and cadets to attend services at local churches in lieu of the academy church or chapel service. West Point is not located in any town; consequently, Army cadets must choose among the services available at the Academy.

Violations are punished in the same manner as violations of the other academy regulations: by reprimands, demerits, marching tours, confinement to quarters and, for repeated violations, expulsion. The academies recognize, however, that some cadets and midshipmen may be excused for conscientious objection to church or chapel attendance.[5]

The academies permit a cadet or midshipman to change the church of his regular attendance if he receives permission from the respective chaplains involved (and from his parents if he is under twenty-one), and on demonstration of a sincere desire to affiliate with a new church.[6]

The government officials responsible for the supervision of the Service Academies testified that the chapel attendance requirements served the purpose of training cadets and midshipmen to become better commanders, rather than any purely religious purpose. Thus Admiral Moorer stated (6 Tr. 191):

> The purpose, of course, is to enhance his leadership and his commandability by putting

[5] The policy statement of the Academy Superintendents in April 1969 included the following language:

"It is understood that intelligent provisions must be made for bona fide cases where attendance would be in conflict with sincerely held convictions of individual cadets or midshipmen." [The Eleventh Conference of Superintendents of the Academies of the Armed Forces. Record of Proceedings. April 18, 1969 at p. 32.]

[6] The Naval Academy regulations provide that "[r]equests for changes to a different denominational church based on personal whims of the midshipman, rather than a sincere desire to affiliate with the stated denomination, will not be approved." Part II, Chapter 15, § 1502.1a of the United States Naval Academy Regulations.

> him in a position where he can get a feel, an understanding of the impact of religion on the various types of individuals and so he can see this in operation; and, consequently, as he acts as a leader in later years, he will appreciate this impact that religion has on so many people.[7]

Admiral Moorer acknowledged that the chapel attendance requirements could have an effect on the religious lives of some cadets and midshipmen (6(a) Tr. 268):

> * * * I think a midshipman who attends, initially, and who has been raised by a family who did not require their children to go to church, might receive from the service, some inspiration, some motivation of his beliefs that would create in him a desire to be more active in the church. * * *

However, it was emphasized that the academies were not attempting to force any system of belief on the cadets and midshipmen. Thus, Rear Admiral James Calvert, Superintendent of the Naval Academy, testified (A Tr. 12):

> If the man in his own intellectual situation really does not believe, that is his privilege; but it is not his privilege as an officer who is fulfilling his job satisfactorily to ignore the religious feelings of his men. He cannot do that.

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[7] Secretary Kelley likewise testified to the training purposes of the chapel requirement (5 Tr. 26–27):

"Very simply the reason for the requirement is to help the midshipmen and the cadets understand the basis of religious belief and practice on the part of other midshipmen and cadets and thus equip him for positions of leadership responsibility in later service life."

Finally both Admiral Moorer and Secretary Kelley stated that the training values sought to be advanced by the chapel attendance requirement could not be obtained by substituting classroom study for the required chapel. Admiral Moorer said (6 Tr. 192):

> [An academic course in morals and ethics and comparative religions] would be artificial because that is not the way that people live and that people feel and so on with respect to religion. So, I think it is better, by far, to permit the midshipmen or require the midshipmen to observe this in a real world, so to speak.

See also the testimony of Secretary Kelley, 5 Tr. 87.

2. THE PROCEEDINGS BELOW

The district court held that the Service Academies' requirement of mandatory chapel attendance did not infringe either the Establishment or Free Exercise Clauses of the First Amendment or the "religious test" clause of Article Six of the United States Constitution.[8] The court of appeals, with Judge MacKinnon dissenting, reversed. Chief Judge Bazelon and Judge Leventhal, in separate opinions for the court of appeals' majority, advanced different reasons for the result. Chief Judge Bazelon held that mandatory chapel attendance is a *per se* violation of the Establishment Clause, on the ground that there are "no overriding secular interests which could ever justify a government's imposition of those religious activities which the Clause was written to abolish." (Appendix

[8] Article VI provides, in pertinent part: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

A, p. 15a, *infra*). Judge Bazelon concluded that the regulations were also unconstitutional under the Free Exercise Clause (*id.*, p. 26a, *infra*). While Judge Leventhal did not reach that issue, he found required chapel attendance "presumptively invalid" as a measure respecting an establishment of religion. In his view, the regulations were invalid because military officials failed to demonstrate that chapel attendance is an "unquestioned and imperative necessity" to the effective training of military officers. Judge MacKinnon dissented, concluding "that the military power recognized by the Constitution authorizes the academies to include the chapel attendance requirement in their curriculum as a *necessary* part of the academies' training, and that such minimal regulation does not violate the First Amendment of the Constitution" (*id.*, p. 57a, *infra*).

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the application of the Religion Clauses of the First Amendment to the training of officers of the Armed Forces.[9] The court of appeals has applied erroneous standards in striking down a century-old practice considered essential to the effective training of cadets and midshipmen at the Service Academies. The academies' chapel attendance requirements are a valid ex-

[9] Article I, § 8, cl. 12, 13 and 14 of the Constitution, give Congress the power "To raise and support Armies * * * [t]o provide and maintain a Navy [and] [t]o make Rules for the Government and Regulation of the land and naval Forces." These enumerated powers necessarily imply the power properly to train military personnel. Cf. *Lichter* v. *United States*, 334 U.S. 742, 778–783.

ercise of authority by the military over its own personnel; they restrict First Amendment interests only to the extent necessary to vindicate legitimate military need.

1. The majority opinions—in holding the chapel attendance requirements "presumptively" invalid or unconstitutional *per se*—make constitutionally suspect any action of the military touching on the religious lives of servicemen. In our view, this approach fails to accord proper weight to the special needs and responsibilities of the Armed Services.

In reviewing military decisions, civilian courts "must accommodate the demands of individual rights and the social order in a context which is far removed from" those encountered in civil litigation. *Noyd* v. *Bond*, 395 U.S. 683, 694. This Court has recognized that in that context "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty * * *." *Burns* v. *Wilson*, 346 U.S. 137, 140. These "overriding demands" have led to judicial recognition that the scope of a serviceman's First Amendment freedoms of speech and expression are not the same as those in civilian life.[10] See *e.g.*, *Cortright* v. *Resor*, 447 F. 2d

[10] "To a certain extent, at least, the military sector of a society must function outside the realm of democratic principles, including the principle of freedom of expression. * * * Certainly, members of the armed forces, at least when operating in that capacity, can be restricted in their right to open discussion." Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 935–936 (1963). See *Cortright* v. *Resor*, 447 F. 2d 245, 253–254, certiorari denied, 405 U.S. 965; *Raderman* v. *Kaine*, 411 F. 2d 1102, 1104, certiorari dismissed, 396 U.S. 976. Similarly, the right of servicemen to distribute literature on

245, 252 (C.A. 2), certiorari denied, 405 U.S. 965; *Raderman* v. *Kaine*, 411 F. 2d 1102 (C.A. 2), certiorari dismissed, 396 U.S. 976; *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C.), affirmed *per curiam*, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981.

Military courts have held that a serviceman's religious freedoms may be subject to reasonable limitation when military necessity requires. See *United States* v. *Cupp*, 24 C.M.R. 565, 570–572 (court martial conviction for refusal to salute superior officer upheld against religious claims of serviceman who became a Jehovah's Witness after his enlistment); *United States* v. *Morgan*, 17 C.M.R. 584, 587–588 (court martial conviction for refusal to "present arms" upheld against religious claims of serviceman who was a Jehovah's Witness); *United States* v. *Burry*, 36 C.M.R. 829, 831 (court martial conviction upheld for refusal to work on Saturday sabbath). *See also Hamilton* v. *Regents*, 293 U.S. 245, 263–264.

On the only occasion on which this Court has commented on the matter, the Court appeared to recog-

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a military base may be subject to greater restraints than those which could validly be imposed on civilians. Compare *Noland* v. *Desorby* (C.A. 6, No. 71–1661, decided April 24, 1972), certiorari denied (No. 72–145, October 16, 1972); *Schneider* v. *Laird*, 453 F. 2d 345 (C.A. 10), certiorari denied, 407 U.S. 914; *Yahr* v. *Resor*, 431 F. 2d 690 (C.A. 4), certiorari denied, 401 U.S. 982; and *Dash* v. *Commanding General*, *supra*, with *Flower* v. *United States*, 407 U.S. 197; *Kiiskila* v. *Nichols*, 433 F. 2d 745, 750 (C.A. 7); and *United States* v. *Bradley*, 418 F. 2d 688 (C.A. 4). And a serviceman's personal freedoms of conduct and appearance must yield to the military's need to establish procedures for duty assignments, see *Noyd* v. *McNamara*, 378 F. 2d 538 (C.A. 10), and to regulate physical appearance, *Anderson* v. *Laird*, 437 F. 2d 912 (C.A. 7), certiorari denied, 404 U.S. 865; *Raderman* v. *Kaine*, *supra*.

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nize that military needs and responsibilities may justify restrictions on a serviceman's religious actions. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642, n. 19. In *Barnette*, Jehovah's Witness parents of school children challenged a West Virginia school board resolution requiring public school children to salute the flag and pledge allegiance. Although the Court struck down this requirement as "invad[ing] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control" (319 U.S. at 642), the Court specifically recognized that "those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life" (*id.* at 642, n. 19).

These cases indicate that the courts will not interfere with "the relationship of the military to its own personnel" (Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L.Rev. 181, 186 (1962)), where challenged military action is reasonably related to the attainment of a legitimate military need and narrowly circumscribed to avoid unnecessary conflict with constitutionally protected interests of servicemen. We submit that, contrary to the court of appeals' ruling, the fact that military action restricts the First Amendment interests of servicemen does not, of itself, create a "presumption" of invalidity or render the military action unconstitutional *per se*.

2. The academies' requirement of mandatory chapel attendance does not violate the freedom of Religion Clauses of the First Amendment, since it restricts con-

stitutionally protected interests only to the extent necessary to ensure effective military training.

The academies have accepted "responsibility for the total development of a cadet [or midshipman]: mental, physical, and moral" (*supra*, p. 3). The selection of training procedures best suited for the development of officers of the highest caliber has been committed to the military. 10 U.S.C. 3012(b)(1), 4331–4355, 6951–6974, 8012(b)(1), 9331–9355; cf. *Orloff* v. *Willoughby*, 345 U.S. 83, 94; *Wasson* v. *Trowbridge*, 382 F. 2d 807, 812 (C.A. 2). They have concluded that the "moral responsibility of command" (A Tr. 5) requires a comprehensive training program which includes regular chapel attendance. As the trial court found, "[e]xperience has shown that * * * a sensitivity to the spiritual needs of men in the times of combat crisis [is] essential in leading men in the face of danger" (Appendix B, p. 83a, *infra;* 316 F. Supp. at 1089). A reviewing court should not lightly substitute its estimates for that judgment.

Moreover, there has been "an unbroken pattern of 150 years of mandatory chapel under the eyes of the President and the Congress, the military authorities, and the public in general" (Appendix B, pp. 80a–81a, *infra;* 316 F. Supp. at 1087–1088). The long existence of this practice "is not something to be lightly cast aside" (*Walz* v. *Tax Commission*, 397 U.S. 664, 678).

To survive a challenge that it is a "law respecting the establishment of religion" governmental action must satisfy three criteria:

> First, the statute must have a secular legislative purpose; second, its principle or primary

> effect must be one that neither advances nor inhibits religion * * *; finally, the statute must not foster "an excessive governmental entanglement with religion" * * * [*Lemon* v. *Kurtsman*, 403 U.S. 602, 612–613; see also *Tilton* v. *Richardson*, 403 U.S. 672, 678].

Under these standards, the chapel attendance regulations pass muster.[11]

The military training purpose of these regulations is established by the record (*supra*, pp. 6–7).

While the academies' regulations may encourage religious tendencies in some cadets and midshipmen or intensify unfavorable attitudes towards religion in others, the *primary* effect of the regulations, as the district court found, is to produce better military officers: men with an understanding of, and respect for, our Judeo-Christian heritage, and a capacity to respond to the religious needs and motivations of the men they command. The religious impact of the regulations is minimized by administrative provisions for excusing conscientious objectors (*supra*, p. 6, n. 5) and

[11] While the Court in prior cases has said that the "establishment of religion" clause of the First Amendment forbids the government to "force [or] influence a person to go to or remain away from church against his will" and that "[n]o person can be punished * * * for church attendance or non-attendance," *Everson* v. *Board of Education*, 330 U.S. 1, 15–16, important constitutional questions cannot always be decided by the application of sweeping generalities to different factual situations. In *Walz* v. *Tax Commission*, 397 U.S. 664, 670, the Court referred to "[t]he hazards of placing too much weight on a few words or phrases of the Court." There is a significant difference between the imposition of prayer and Bible reading in the public schools (see, *e.g.*, *Abington School District* v. *Schempp*, 374 U.S. 203) and the military regulations here, which apply only to military personnel training of their own volition to become officers of the Armed Forces.

those for whom the services are "counterproductive" (5 Tr. 79). Moreover, since the cadets and midshipmen are of college age, the religious impact of required attendance is likely to be secondary.[12] See *Tilton* v. *Richardson*, 403 U.S. at 686. Finally, in the considered judgment of the responsible officials the values found in chapel services would be lost if academic classes in morals and comparative religion were substituted. Thus the regulations do not violate the injunction that the government not "use essentially religious means to serve governmental ends where secular means would suffice." *Abington School District* v. *Schempp*, 374 U.S. 203, 231 (Brennan, J., concurring); *Walz* v. *Tax Commission*, 397 U.S. 664, 680 (Brennan, J., concurring).

Nor do the attendance regulations foster "an excessive governmental entanglement with religion." *Walz* v. *Tax Commission, supra*, 397 U.S. at 674. As the court below acknowledged (Appendix A, p. 32a, *infra*), the Establishment Clause does not prohibit the academies from providing property, facilities, and personnel in order to permit chapel and church attendance by cadets on a voluntary basis. *See Abington School District* v. *Schempp*, 374 U.S. at 296–297 (Bren-

[12] The cadet or midshipman at the academies is obviously less susceptible to inculcation of religious beliefs than a pre-college student might be, "since either his basic religious personality has already been formed or it can be influenced successfully only by stimulating the student to acquire understanding and insight which persuade him to accept certain religious teachings." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 583 (1968). See, also, Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1680, 1691 (1969).

nan, J., concurring); *id.* at 306 (Goldberg, J., concurring). Thus the academies' financial involvement in the administration of these regulations does not "excessively" involve the government. As we have contended above (*supra,* pp. 2–8), the compulsory aspect of the chapel program involves the government in religion only to the extent necessary to attain legitimate military training objectives. Such involvement is not "excessive" in light of its overriding military purpose.

3. The court of appeals also erred in holding that mandatory chapel attendance could not constitutionally be imposed as a condition of admission to the Service Academies (Appendix A, p. 47a, *infra*). For "[i]t is sometimes proper to condition the grant of a privilege upon the surrender of a right that cannot be taken away directly * * * if granting the privilege enhances the state's interest in denying the right. The interest in requiring disclosure of associations or beliefs, for example, increases if one is to be given access to military secrets." Currie, *Suitcase Divorce in the Conflict of Laws,* 34 U.Chi.L.Rev. 26, 32 (1966). See generally French, *Unconstitutional Conditions: An Analysis,* 50 Geo. L.J. 234, 247–248 (1961). In our view, the academies' attendance requirement meets this test. Attendance at the academies is voluntary. Prospective applicants are told of the chapel requirements prior to their acceptance (App. 145–149). In view of the government's interest in requiring some minimal exposure to religion of those admitted, whose leadership capacity will depend in part on an ability to understand the concrete religious needs and motivations of others, compulsory chapel

attendance is a valid condition upon attendance at the Service Academies.

CONCLUSION

The Service Academies are conducting an educational program for the purpose of providing well and broadly trained officers for our armed forces. Within very wide limits the persons charged with planning and carrying out that program should be free to determine its content and details. The responsible officers of the government have long held the position that awareness of our moral and religious heritage is an essential part of the education of future military leaders at the Service Academies. No cadet or midshipman is required to believe what he hears. No one is subjected to a catechism by governmental authority. But all students are required to gain an appreciation of our moral and religious heritage. This should be recognized as an appropriate part of education and within the proper authority of those charged with the development of the educational program of the Service Academies. To say that this is an establishment of religion is to be tyrannized by labels, while unduly denigrating the authority of those responsible for the educational program of the military services acting, under the power expressly granted by the Constitution to "make Rules for the Government and Regulation of the land and naval Forces."

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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OCTOBER 1972.

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,617

MICHAEL B. ANDERSON, ET AL., APPELLANTS

v.

MELVIN R. LAIRD,
SECRETARY OF DEFENSE OF THE UNITED STATES
OF AMERICA, ET AL.

Appeal from the United States District Court
for the District of Columbia

Decided June 30, 1972

Mr. Warren K. Kaplan, with whom *Mrs. Hope Eastman* was on the brief, for appellants.

Mr. Robert J. Higgins, Assistant United States Attorney, with whom *Messrs. Thomas A. Flannery,* United States Attorney at the time the brief was filed, and *John A. Terry* and *Joseph M. Hannon,* Assistant United States Attorneys, were on the brief, for appellee.

Mr. Joseph B. Friedman filed a brief on behalf of the Baptist Joint Committee on Public Affairs, as *amicus curiae* urging reversal.

Mr. John J. Adams filed a brief on behalf of the General Commission on Chaplains and Armed Forces Personnel, as *amicus curiae* urging reversal.

Messrs. Joel H. Levy and *Albert E. Arent* filed a brief

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on behalf of the American Jewish Congress, et al., as *amicus curiae*.

Before BAZELON, *Chief Judge*, and LEVENTHAL and MACKINNON, *Circuit Judges*.

Opinion *per curiam*.

Opinion for reversal filed by BAZELON, *Chief Judge*.

Separate opinion for reversal filed by LEVENTHAL, *Circuit Judge*, at p. 29.

Dissenting opinion filed by MACKINNON, *Circuit Judge*, at p. 47.

PER CURIAM: The separate opinions of Chief Judge Bazelon and Circuit Judge Leventhal concur in the conclusion that the judgment of the District Court, denying appellants' motions for declaratory and injunctive relief against compulsory chapel attendance at the military academies should be reversed. The case is remanded for the entry of an appropriate order. Circuit Judge MacKinnon dissents.

BAZELON, *Chief Judge*: This appeal seeks reversal of the District Court's decision that the requirement of mandatory chapel attendance for cadets and midshipmen at three federal military academies does not violate the Freedom of Religion Clauses of the First Amendment,[1] or the "religious test" clause of Article Six of the United States Constitution.[2] We reverse, and hold that the regulations at issue are invalid under the Establishment Clause. Although Judge Leventhal joins me in this holding, his reasons are expressed in a separate concurrence. It is the opinion of this writer that the regulations also

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[1] The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

[2] Article Six of the Constitution reads in pertinent part: "No religious test shall ever be required as a qualification to any office or public trust under the United States."

violate the Free Exercise Clause. Judge MacKinnon, in dissent, would uphold the decision of the District Court, 316 F. Supp. 1081 (D.D.C. 1970).

I.

Plaintiffs brought this suit as a class action on behalf of all cadets and midshipmen at the United States Military Academy at West Point, New York, the United States Naval Academy at Annapolis, Maryland, and the United States Air Force Academy at Colorado Springs, Colorado. There is no dispute that the regulations for these three institutions require attendance at Protestant, Catholic or Jewish chapel services on Sundays. The regulations are unequivocal [3] and violations are punished by reprimands, demerits, punishment marching tours, confinement to quarters, and possible expulsion. The Naval and Air Force Academies do allow the midshipmen and cadets to attend

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[3] The West Point regulation provides:

"Attendance at Chapel is part of a cadet's training; no cadet is exempt. Each cadet must attend either the Cadet Chapel, Catholic Chapel or Jewish Chapel service each Sunday, according to announced schedules." Regulations for The United States Cadet Corps of the United States Military Academy, Chapter 8, Section IV, paragraph 819.

The Naval Academy regulation provides:

"1. The basic requirements concerning religious matters at the Naval Academy are:

(a) All midshipmen will attend church or chapel services on Sunday mornings but are required to attend at no other times."

Part II, Chapter 15, § 1501 of the United States Naval Academy Regulations.

The Air Force Academy regulation provides:

"Attendance at an established church service is mandatory for those Second, Third and Fourth Classmen present for duty in the Cadet Area."
Air Force Cadet Regulation No. 265-1.

services at local churches instead of the academy chapels. No alternative attendance is permitted at West Point because there are no local religious institutions.

The academies permit a cadet or midshipman to change his regular attendance only after he receives permission from the respective chaplains involved and from his parents if he is under twenty-one. The Naval Academy regulations provide that "[r]equests for changes to a different denominational church based on personal whims of the midshipman, rather than a sincere desire to affiliate with the stated denomination, will not be approved."[4] The academies also formally recognize that some cadets and midshipmen may be excused for conscientious objection to church or chapel attendance.[5]

To test the constitutionality of these regulations under the Establishment Clause, the District Court applied the reasoning of the Supreme Court in *School District of Abington Township* v. *Schempp:*

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If

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[4] Part II, Chapter 15, § 1502.1.a of the United States Naval Academy Regulations.

[5] This policy was formulated at a meeting of the Academy Superintendents in 1969:

> "It is understood that intelligent provisions must be made for bona fide cases where attendance would be in conflict with sincerely held convictions of individual cadets or midshipmen."
>
> The Eleventh Conference of Superintendents of the Academies of the Armed Forces, Record of Proceedings, April 18, 1969 at 32.

The effect of this policy is unclear, since only three midshipmen have been excused from attendance by the Naval Academy in the past forty years, and no cadet at West Point has ever been excused. However, neither the existence nor the viability of this policy is dispositive in view of the Supreme Court's interpretation of the Establishment Clause. *See* pp. 21-22 *infra*.

> either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution."[6]

The court below held that the regulations did not violate the Establishment Clause because the purpose and effect thereof were secular, not religious.

The District Court reasoned that there is a crucial distinction between "attendance" at religious services and "worship" at those services; that the military academies require only attendance at Sunday services for the secular purpose of providing an "overall training program designed to create effective officers and leaders by preparing them to meet all the exigencies of command";[7] and that the primary effect of compulsory attendance is also secular "in that it enables those who will one day hold command positions to gain an awareness and respect for the force religion has on the lives of men so as to react for the benefit of all in combat crises including the giving of spiritual counseling and guidance to those who turn to religion in such situations."[8]

The District Court found no violation of the Free Exercise Clause because an "individual chooses which service to attend and he chooses whether to participate and worship or not. And for sincerely held reasons he can be excused from attendance."[9]

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[6] 374 U.S. 203, 222 (1963).

[7] *Anderson* v. *Laird*, 316 F.Supp. 1081, 1090 (D.D.C.1970).

[8] *Ibid.* The court found no violation of the "religious test" clause because of the "close connection between the establishment prohibition and the test oath prohibition. The Court having determined that there is no violation of the Establishment Clause . . . it necessarily follows that there can be no violation of the test oath prohibition." *Id.* at 1093.

[9] *Id.* at 1091.

In making its decision, the court accorded great weight to the opinions and judgments of the military personnel concerned with officer training; noted the unbroken tradition of compulsory chapel attendance at the academies; and relied on the traditional reluctance of courts to interfere in the management of the armed forces.[10]

These regulations, however, exceed the constitutionally permitted scope of governmental power. Study of the history of the First Amendment and the Supreme Court decisions interpreting it instructs that the Establishment Clause was written to abolish certain forms of governmental regulation of religion in order to protect absolutely the core values of religious liberty. Attendance at religious exercises is an activity which under the Establishment Clause a government may never compel.

II.

The language of the First Amendment expresses the feelings aroused in early America in reaction to the religious conditions and practices transplanted from the Old World. The background of the First Amendment has been probed in depth in many Supreme Court opinions [11] and, in

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[10] Citing *Orloff* v. *Willoughby*, 345 U.S. 83 (1953); *Nixon* v. *Secretary of Navy*, 422 F.2d 934 (2d Cir. 1970); *Raderman* v. *Kaine*, 411 F.2d 1102 (2d. Cir. 1969); *Byrne* v. *Resor*, 412 F.2d 774 (3rd Cir. 1969); *Smith* v. *Resor*, 406 F.2d 141 (2d Cir. 1969); *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968), *cert. denied* 394 U.S. 929 (1969) and others.

[11] Foremost among these are Mr. Justice Black's Opinion of the Court and Mr. Justice Rutledge's dissent in *Everson* v. *Board of Education*, 330 U.S. 1 (1947). The two opinions agree that the struggle for religious liberty in Virginia, led

the words of Mr. Justice Rutledge, "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment." [12]

Compulsory church attendance was one of the primary restrictions on religious freedom which the Framers of our Constitution sought to abolish.[13] Nonattendance was often treated as an offense which could be severely punished in order to enforce loyalty to an established sect.[14]

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by James Madison and Thomas Jefferson, culminated in the drafting of the Religion Clauses of the First Amendment. *See also Engel* v. *Vitale*, 370 U.S. 421, 431-35 (1962).

[12] *Everson* v. *Board of Education*, *supra note* 11, 330 U.S. at 33.

[13] The views of Roger Williams, progenitor of the theory of separation of church and state, are succinct on this point:

> "There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or human combination, or society. It hath fallen out sometimes, that both Papists and Protestants, Jews and Turks, may be embarked in one ship; upon which supposal, I affirm that all the liberty of conscience I ever pleaded for, turns upon these two hinges, that none of the Papists, Protestants, Jews, or Turks be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers or worship, if they practice any." 1 STOKES, CHURCH AND STATE IN THE UNITED STATES 197 (1950). Also quoted in *School District of Abington Township* v. *Schempp*, *supra* note 6, 374 U.S. at 214, n. 6.

For a thorough discussion of the efforts to dis-establish religion during and after the Revolution, *see* S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 482-509 (1968).

[14] In Virginia, the Governor Sir Thomas Dale ordained in 1612 that "non-attendance on religious services entailed a penalty, for the first offense, of the stoppage of allowance; for the second, whipping; for the third, the galley for six

The "Virginia Bill for Religious Liberty", originally drafted by Thomas Jefferson, was enacted in Virginia in 1786 in the wake of the defeat of the state's tax levy for support of established churches. This legislation culminated James Madison's and Jefferson's struggle for religious liberty in that state. The Bill specifically provided:

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . ." [15]

This statute seeks to define certain categories of governmental involvement with individual religious conduct which must be prohibited. The writers of the First Amendment abandoned this definitional task in favor of drafting broader language to forbid any law "respecting an establishment of religion, or prohibiting the free exercise thereof". The actions which the Virginia legislation forbade indicate a core value which remains protected by the Establishment Clause—freedom from governmental

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months." The first Virginia Assembly whose acts have been recorded provided for absence from Church for one Sunday the fine of five pounds of tobacco in 1623. And in 1631, absentees from Church were to be fined one shilling for each offence. *See* COBB, *supra* note 13, at 78, 80, 82-83. What Cobb refers to as "a desire for old-time persecution" occasionally reared its head in eighteenth century Virginia. In 1722, the Grand Jury returned thirteen presentments for absenteeism. *Id.* at 99.

In Massachusetts, the "law of domicile . . . required all people to live within easy distance of the meeting-house so that all could attend worship." *Id.* at 176. Furthermore, nonattendance at services was punished by a fine of five shillings in 1646. *Id.* at 177.

[15] 12 Hening, Statutes of Virginia (1823) 84, also quoted in *Everson* v. *Board of Education*, *supra* note 11, 330 U.S. at 13.

imposition of religious activity. The Supreme Court has recognized that "the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." [16]

The struggle in Virginia also led Madison to write his famed "Memorial and Remonstrance Against Religious Assessments." [17] This document reflects Madison's opposition to official relations between church and state in every form and to every degree, whether the relations afforded a preference to a particular sect or simply aided in general the practice of religion. Thus the word *religion* "connotes the broadest content, determined not by the form or formality of the teaching or where it occurs, but by its essential nature regardless of those details." [18] The Government is prohibited from "establishing" all religions as well as just one.[19] And, it is also the legacy of

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[16] *Everson* v. *Board of Education, supra* note 11, 330 U.S. at 13, citing *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871); and *Davis* v. *Beason*, 133 U.S. 333, 342 (1890). *And see McGowan* v. *Maryland*, 366 U.S. 420, 437 (1961).

[17] II Writings of James Madison 183, reproduced in full as the Appendix to Mr. Justice Rutledge's dissent in *Everson* v. *Board of Education, supra* note 11, 330 U.S. at 63.

[18] *Everson* v. *Board of Education, supra* note 11, 330 U.S. at 33 (Rutledge, J. dissenting).

[19] The Supreme Court "has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another." *School District of Abington Township* v. *Schempp, supra* note 6, 374 U.S. at 216. *See also Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 210-211 (1948) and *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961).

Madison's writings which teach that certain governmental practices must be abolished completely, no matter how slight an incursion they seem to work on the essential nature of religious liberty.[20]

This brief account reveals that the men who framed the Religion Clauses of the First Amendment were writing to abolish specific governmental practices which destroyed individual religious liberty and thereby "established" religion. Governmental compulsion of church attendance was one of those practices.

III.

However, the holding in this case does not rest on history alone.[21] The Supreme Court has applied the Estab-

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[20] J. Madison, "Memorial and Remonstrance", *supra* note 17, quoted in *Everson* v. *Board of Education, supra* note 11, 330 U.S. at 65-66:

> "[I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"

[21] That the Framers intended to abolish a specific practice might not be dispositive today, at least in the opinion of Mr. Justice Brennan. In *Schempp*, he warned against a "too

lishment Clause in circumstances unfamiliar to early Americans,[22] and has interpreted it to prohibit those governmental actions which pose the same threat to religious liberty as did earlier colonial practices.[23] Thus in *Everson* v. *Board of Education,* Mr. Justice Black wrote for the Court:

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literal quest for the advice of the Founding Fathers" because of the ambiguity of the extant history, but also because the changing circumstances of American life call for a broad application of the principles established in colonial times. 374 U.S. at 237-242. He noted that the Fathers were concerned with "far more flagrant intrusions of government into the realm of religion . . ." than we might see today. *Id.* at 237. The relevance of history to our opinion in this case is that compulsory attendance laws were among the very "flagrant intrusions" which the Establishment Clause was written to abolish.

[22] The Framers "did not limit the constitutional proscription to any particular, dated form of state-supported theological venture." *McGowan* v. *Maryland,* 366 U.S. 420, 465 (1961) (Opinion of Frankfurter, J.).

[23] The Court has framed its task as translating the "majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century. . . ." *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 639 (1943). A broad interpretation of the Clause is justified by the general language of the Amendment, since, in its final form, the Amendment "did not simply bar a congressional enactment *establishing a church.* . . . [The Court] has found that the First and Fourteenth Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church." *McGowan* v. *Maryland,* 366 U.S. 420, 442 (1961).

Mr. Justice Brennan has succinctly stated that the proper inquiry "is whether the practices here challenged threaten those consequences which the Framers deeply feared. . . ." *School District of Abington Township* v. *Schempp, supra* note 6, 374 U.S. at 236.

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." [24]

Our case would seem to be resolved by *Everson*, since the attendance regulations undoubtedly force or influence church attendance, and non-attendance is admittedly punished. The inquiry cannot begin and end with *Everson*, however, for while this reading of the Establishment Clause has been re-affirmed several times [25] it has also been difficult to apply. Certain forms of government involvement which recognize, favor and even support religious interests have been sustained under the Establishment Clause in order to avoid conflict with the Free Exercise Clause.

That conflicts are created by an absolute rendering of each Clause is now well-recognized.[26] In *Walz* v. *Tax*

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[24] 330 U.S. at 15-16.

[25] *See Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 210-211 (1948); *McGowan* v. *Maryland*, 366 U.S. 420, 443 (1961); and *Torcaso* v. *Watkins*, 367 U.S. 488, 492-93 (1961).

[26] Scholarly comment on this conflict is extensive. *See, e.g.*, Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968); Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Gianella, *Religious Liberty, Nonestablishment, and*

Commission,[27] relied on by the District Court in this case,[28] Chief Justice Burger pointed out that not only was an absolute separation of church and state impossible, but also the absolute language of both Religion Clauses might have to be ignored in order to accommodate the values protected by each. "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." [29]

The need for accommodation between the two Clauses is evident in *Walz*. In that case the Court upheld a New York State tax exemption for houses of religious worship challenged as a violation of the Establishment Clause. The Court recognized that the statute did grant an indirect economic benefit to churches [30] and might therefore violate the Establishment Clause, interpreted as it was in *Everson* as prohibiting laws which *aid* all religions. On the other hand, deliberate exclusion of religious institutions from the tax exemption [31] would possibly violate the Free Exercise Clause.[32] The Chief Justice, writing for the

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Doctrinal Development, 80 HARV. L. REV. 1381 (1967); and Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1313 (1970).

[27] 397 U.S. 664 (1970).

[28] *Anderson* v. *Laird*, *supra* note 7, 316 F.Supp. at 1087.

[29] *Walz* v. *Tax Commission*, *supra* note 27, 397 U.S. at 669.

[30] *Id.* at 674.

[31] The exemption extended to other non-profit charitable property.

[32] The opinion in *Walz* refers to other municipal benefits which could not arguably be withdrawn from religious institutions under the Free Exercise Clause:

"Separation in this context cannot mean absence of all

Court, therefore questioned the breadth of the language in *Everson*[33] and devised the principle of benevolent neutral-

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contact; the complexities of modern life inevitably produce some contact and the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons or institutions within a State's boundaries, along with many other exempt organizations." *Id.* at 676.

For other difficulties inherent in withdrawing tax exemptions from religious institutions *see* Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969). *Walz* also draws its lesson that the Establishment Clause must bend to accommodate free exercise rights from four other Supreme Court decisions. In *Everson* itself, the use of public funds to reimburse parents of parochial school children, admittedly an aid to their religious education, was upheld as a neutral form of governmental action which had to be extended to users of religious schools—analogous to governmental police and fire protection. 330 U.S. at 16-18. In *Zorach* v. *Clauson*, 343 U.S. 306 (1952), a released time program for religious instruction outside New York's public schools was upheld as a neutral "accomodation" to "the religious needs of the people" despite the majority's recognition that the program in fact encouraged religious education. 343 U.S. at 313-315. And in *Board of Education* v. *Allen*, 392 U.S. 236 (1968) the Court upheld the New York State subsidy of textbooks loaned to parochial school children relying heavily on the analysis of *Everson*. Finally, in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), deference to the Free Exercise Clause mandated the Court's striking down a state statute which provided *no* exceptions for practitioners of special religious sects. *See* the discussion of these cases in *Walz*, 397 U.S. at 669-672.

[33] "The hazards of placing too much weight on a few words or phrases of the Court is abundantly illustrated within the pages of the Court's opinion in *Everson*." *Walz* v. *Tax Commission*, *supra* note 27, 397 U.S. at 670. The Chief Justice noted that the Court had stated in *Everson* that the government cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another" but had no difficulty in upholding a taxing statute which undoubtedly helped children get to church schools. *Ibid.*

ity between State and Church to accommodate no-establishment and free exercise values.[34]

This principle was mistaken by the District Court as authority for its holding that all First Amendment rights must bend when they conflict with military interests.[35] The Supreme Court's interpretations of the Establishment Clause refer to no overriding secular interests which could ever justify a government's imposition of those religious activities which the Clause was written to abolish. It should be clear from *Walz* that the actions absolutely proscribed by the Establishment Clause, among which is the compulsion of church attendance, could be constitutionally justified only out of the necessity of preserving the right to free exercise of religion.[36] To decline to apply the Clause absolutely in this case is to create a loophole in the scope of its protection which the Supreme Court simply does not admit. This is the crux of the difference of

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[34] *Id.* at 669.

[35] The District Court prefaced its analysis of the regulations at issue thus:

> "Nor is it revolutionary to say that First Amendment rights are not absolute. . . And although the Religion Clauses are couched in absolute terms, it is not realistically possible to have absolute or perfect separation and non-involvement. Zorach v. Clauson. . . The very existence of the clauses denotes an involvement of sorts. As the Chief Justice has said, '* * * [T]here is room for play in the joints productive of a benevolent neutrality * * *.' Walz v. Tax Commission. . . ." *Anderson* v. *Laird, supra* note 7, 316 F.Supp. at 1087.

[36] Thus, accommodation of the Establishment Clause to permit maintenance of religious personnel and institutions within the military is necessitated not by military interests, but by the mandate of the Free Exercise Clause that soldiers be given the opportunity to worship.

opinion between Judges Leventhal, MacKinnon, and myself.[37]

Admittedly, when the liberties protected by the two Religion Clauses conflict, there must be "play in the joints" between them. But when abolition of governmental imposition of religious activity presents no conflict with the Free Exercise Clause, the principle of accommodation espoused in *Walz* has little relevance.

In this case, rather than conflicting, the two Clauses complement each other and dictate the same result.[38] Abolition of the attendance requirements enhances rather than violates the free exercise rights of cadets and midshipmen. The Establishment Clause should therefore be read as it was in *Everson*: "Neither a state nor the Federal Government . . . can force nor influence a person to go to or to remain away from church against his will."[39]

IV.

The force of this language in *Everson* has not been diminished by subsequent Supreme Court opinions. *Walz* in

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[37] The dissenting and concurring opinions disagree as to the sufficiency of the academies' showing that the regulations are both necessary, and secular in purpose and effect. But neither cites authority for their underlying premise—that military or any other types of interests can "justify" in constitutional terms what is otherwise a clear violation of the Establishment Clause. This type of balancing analysis is confined to judicial interpretation of the Free Exercise Clause, *see, e.g., Sherbert* v. *Verner*, 374 U.S. 398 (1963), in cases where bizarre or disruptive religious practices have been proscribed. It is the history of, and the Supreme Court's applications of, the Establishment Clause which make necessary the holding that no possible showing could validate enforced church attendance. *See Torcaso* v. *Watkins*, 367 U.S. 488, 494 (1961); *Engel* v. *Vitale*, 370 U.S. 421, 425 (1962).

[38] See Part VI. of this opinion.

[39] 330 U.S. at 15.

fact re-affirms the teaching of *Everson* that there are certain forms of governmental involvement with religion which the Establishment Clause prohibits absolutely:

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: *that we will not tolerate either governmentally established religion or governmental interference with religion. Short of these expressly proscribed governmental acts* there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." [40] (Emphasis added.)

Compulsory attendance requirements fall squarely within this principle. As the history recounted above shows, official adoption of a single creed is not the sole act of establishment. Compulsory attendance at worship and prayer, profession of belief and payment of tithes are necessary concomittants.[41]

The Government's contention that there is a difference between compelling attendance at church and compelling worship or belief [42] is completely without merit. Neither appellees, nor the dissenting opinion *infra*, reveal how a government could possibly compel individual worship or belief other than by compelling certain overt actions—for example, profession of belief in God; recitation of prayers; or mere presence during Bible readings. Attendance during chapel services is indistinguishable from these

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[40] 397 U.S. at 668.

[41] *See generally*, Cobb, *supra* note 13, at 74—301.

[42] The District Court accepted this distinction. *Anderson v. Laird*, *supra* note 7, 316 F.Supp. at 1091. Had it not, we can only speculate as to whether the court would have reached the same result under the "purpose and effect" test or would have recognized that compulsory worship is absolutely prohibited by the Establishment Clause.

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other overt actions, the compulsion of which has been declared unconstitutional in *Torcaso* v. *Watkins*,[43] *School District of Abington Township* v. *Schempp*,[44] and *Engel* v. *Vitale*.[45]

It is derived from these cases, as well as from history, that freedom from governmental imposition of religious activity is a core value protected by the Establishment Clause,[46] and that therefore a government may not require an individual to engage in religious practices or be present at religious exercises.[47] The "purpose and effect" test developed in *McGowan* v. *Maryland*[48] does not undermine

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[43] 367 U.S. 488 (1961).

[44] 374 U.S. 203 (1963).

[45] 370 U.S. 421 (1962).

[46] "Almost every Supreme Court Justice who has written an opinion involving the establishment clause has identified no imposition as an establishment value." Schwarz, *supra* note 26 at 721. *See Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203,210-211 (1948); *Engel* v. *Vitale*, *supra* note 45, 370 U.S. at 431; *Everson* v. *Board of Education*, *supra* note 11, 330 U.S. at 26 (dissenting opinion of Jackson, J.); and *Zorach* v. *Clauson*, 343 U.S. 306, 311 (1952).

[47] Passing references by the Supreme Court to the fact that the government may not compel church attendance are numerous. "[The government] may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952); "[The government] cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character." *Everson* v. *Board of Education*, *supra* note 11, 330 U.S. at 26 (dissenting opinion of Jackson, J.) *See also United Public Workers* v. *Mitchell*, 330 U.S. 75, 100 (1947) and *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952).

[48] 366 U.S. 420 (1961). Although the Court did not define

this principle. The test is properly applied when there is some ambiguity about the nature of the activity imposed by the government, and thus some question whether the values protected by the Establishment Clause are actually threatened. In *McGowan* it was necessary for the Court to inquire extensively into the purpose and effect of Maryland's Sunday-closing laws.[49] The Court found that these laws did not impose religious practices on anyone, but allowed individuals to spend the day of rest as they pleased.[50] Since the laws did not threaten to impose religious activity, the secular purpose and effect outweighed any incidental benefit to those who chose to attend services on Sundays.[51]

In later cases, the "purpose and effect" test has been used only to underscore the religious nature of the activity actually imposed by the government. In striking down the Maryland test oath of belief in God in *Torcaso v. Watkins*, the Court ascertained the purpose and effect of the law

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the test succinctly until *Schempp*, the opinions in *McGowan* analyze extensively the purpose and effect of the laws at issue. *See* the closing paragraph of the Opinion of the Court, 366 U.S. at 453.

[49] Chief Justice Warren wrote:

> "There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces. But what we must decide is whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character." *Id.* at 431.

[50] *Id.* at 449.

[51] That the "purpose and effect" test is really a balancing test when the core values of the Establishment Clause are not at stake is not stated explicitly by the Supreme Court but is discussed by commentators. *See* Schwarz *supra* note 26, at 702-704.

from its very language.[52] Re-affirming its approach in *Everson*, the Court held that governmental imposition of this form of religious exercise—profession of belief—was absolutely proscribed by the First Amendment.[53] In *Engel* v. *Vitale* the Court expressed "no doubt that New York's program of daily classroom invocation of God's blessings . . . is a religious activity."[54] Once it was conceded that the prayer was of a "religious nature", inquiry into its possible secular purpose or effect was halted[55] since governmental imposition of this activity could not be justified.

The court in *Schempp* in fact noted that Bible readings in the public schools could have a secular purpose.[56] However, the Court's factual inquiry into the purpose and effect of the readings began and ended with its recogni-

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[52] "There is, and can be, no dispute about the purpose or effect of the Maryland Declaration of Rights requirement before us—it sets up a religious test which was designed to and, if valid, does bar every person who refuses to declare a belief in God from holding a public 'office . . .' ". *Torcaso* v. *Watkins*, *supra* note 43, 367 U.S. at 489-490.

[53] *Id.* at 495.

[54] 370 U.S. at 424.

[55] The Court ignored the attempt by the Board of Regents of New York to "distinguish this prayer because it is based on our spiritual heritage" and thus inculcates more than a religious lesson. *Id.* at 425.

[56] The States contended that among the secular purposes of the Bible readings "are the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." *School District of Abington Township* v. *Schempp*, *supra* note 6, 374 U.S. at 223. The Court stated: "[E]ven if its purpose is not strictly religious. . ." *Id.* at 224, it was impermissable because sought to be accomplished through readings from the Bible.

tion that the Bible was an instrument of religion.[57] The conclusion necessarily followed that "the laws require religious exercises and such exercises are being conducted in direct violation of [the pupils'] rights. . . ."[58] Again, no finding of a secular purpose or effect could justify this form of governmental imposition of religion.

Thus the trial court's findings of fact in the case before us cannot avert the impact of the decisions of the Supreme Court. The military regulations on their face compel presence at religious exercises.[59] The appellees do not deny that the chapels conduct genuine services of worship, which include Bible readings and weekly invocations of God's blessings.[60] This is scarcely the *minimal* exposure to religion the dissent would have us believe. The trial court should have investigated "purpose and effect" no further since the very language of the regulations reveals that the government is imposing conduct in violation of the letter and the spirit of the Establishment Clause.

It is of no importance that certain cadets and midshipmen may be excused from attendance for conscientiously held beliefs. Such was also true in *Engel* and *Schempp*. We rely on the Supreme Court's holding in *Engel*:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular

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[57] *Id.* at 224.

[58] *Ibid.*

[59] *See* note 3, *supra*.

[60] *See, e.g.*, the worship programs and sermon attached on pages 134-135, and 150-153 of the Appendix.

> form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." [61]

We reject also the trial court's allusion to the notion that the attendance requirements ought not be considered compulsory since the military academies are voluntary institutions. It is certainly true that in this case attendance at the academies is not mandatory.[62] However, the Supreme Court's decision in *Torcaso* v. *Watkins* turns on its holding that the government may not attach unconstitutional conditions to the award of public employment.[63] An individual's voluntary assumption of an employment or an educational relationship with the government is not a waiver of First Amendment rights.[64]

V.

The court below, however, grounded its decision in a deference to the unique role of the military in our society.

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[61] 370 U.S. at 430-431.

[62] Unlike *Schempp*, *Engel* v. *Vitale* and *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943) in which attendance at the public schools was mandatory.

[63] "The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution. This was settled by our holding in *Wieman* v. *Updegraff*, 344 U.S. 183. We there pointed out that whether or not 'an abstract right to public employment exists,' Congress could not pass a law providing '. . . that no federal employee shall attend Mass or take any active part in missionary work.'" (footnote omitted). 367 U.S. at 495-496.

[64] *Hamilton* v. *Regents of the University of California*, 293 U.S. 245 (1934) is not to the contrary. *See* note 80 *infra*.

In fact, it is difficult to believe that the trial court would have sustained the attendance requirements were any other than select military educational institutions involved —if, for example, the Government had made church attendance compulsory for all welfare recipients; for all elected officials; or even for all of its fighting forces.[65]

In passing, it should also be noted that the court accorded great weight to the testimony of military officials about the *effect* of the academy regulations.[66] This casts serious doubt on the validity of the trial court's findings, since those upon whom the regulations have an impact—the students and their religious advisors—are uniquely qualified to testify to their effect.[67] However, it is not

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[65] Such possible extensions of the rationale of the District Court's opinion are not to be glossed over. It is not farfetched to imagine that an imposing argument could be martialed for the proposition that all elected officials should attend church since it is important for them to understand the spiritual forces which motivate and effect a substantial portion of the population in this country, just as such an understanding may be important for our military leaders.

[66] The court below states that it was not "downgrading" the testimony offered by plaintiffs. 316 F.Supp. at 1090. However, the following statement does establish that the District Court relied on military testimony as expert testimony in making its findings of fact:

> "[T]he testimony adduced by the plaintiffs was presented by persons who are not now and never have been directly concerned with the training of our military leaders. As moralists the Court must accord them due deference, but in matters military the Court feels constrained to look to the military experts." *Ibid.*

[67] The "effect" of a regulation is a separate question from the "necessity" for it. Evidence as to the effect of the attendance requirements from military officials should have been weighed only equally against evidence from other relevant sources—for example, chaplains who have con-

necessary to the disposition of this case to overturn the findings, since any factual inquiry, beyond noting that attendance at religious exercises was compelled, was unnecessary.[68]

In contrast to the holding of this opinion that secular interests may never justify governmental imposition of church attendance, the District Court decided that this absolute rendering of the Establishment Clause could be abandoned since the military's interest in training a select group of officers was at stake.[69] This is also the position of the dissenting opinion, *infra*. However, a careful examination of the cases relied on by the District Court indicates that while an individual's freedoms may of necessity be abridged upon his entrance into military life, there is no authority for the point that his right to freedom of religion is abolished.[70]

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ducted chapel services. Furthermore, since the court below emphasized that the *purpose* of a military regulation may change over the centuries of its existence, it should have been equally open to the possibility that the *effect* may also change and that students presently enrolled in the academies are in the best position to analyze the current effect.

[68] *See* Part IV. of this opinion.

[69] *See* note 35, *supra*. The District Court also stated:

> "As a guiding principle it can be said that the amount of judicial interference with the military should be limited; the amount of deference given the military in matters of discipline and training should be wide." 316 F.Supp. at 1085-86.

[70] *See, e.g., Orloff* v. *Willoughby, supra* note 10, 345 U.S. 83; *Cortright* v. *Resor*, 447 F.2d 245 (2d Cir. 1971); *Raderman* v. *Kaine, supra* note 10, 411 F.2d 934, and cases cited in note 10, *supra*. The dissent candidly admits at pp. 53-55, *infra* that decisions holding that constitutional rights do not apply fully to the military are limited to questions of criminal procedure and military discipline. Although free

Personal freedoms of conduct and appearance have been accommodated to the military's perceived need to establish procedures best suited to regulate its day-to-day operations, duty assignments and call-up orders;[71] to determine a reservist's discharge of his duties;[72] to regulate physical appearance;[73] and to ascertain "the essential characteristics of fitness for duty."[74] This deference to military decisionmaking has been justified by the military's role, its mandate to prepare for the waging of war, and the necessity of this mandate for our national security. However, deference has inherent limitations which have also been fully recognized in judicial decision.

Thus, although First Amendment rights to free speech and expression may be "less" for a soldier than a civilian, they are by no means lost to him. The Second Circuit has emphasized in *Cortright* v. *Resor* that "we are far from holding that under no circumstances could a civilian court interfere with a transfer order or prescribe other relief if that were needed to prevent abridgement of a soldier's First Amendment rights."[75]

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exercise rights may have to bend to military exigencies, I would again emphasize that this is not authority for the military to *impose* religious exercise on its members.

[71] *Orloff* v. *Willoughby, supra* note 10, 345 U.S. 83; *Nixon* v. *Secretary of the Navy, supra* note 10, 422 F.2d 934; *U.S. ex rel. Schonbrun* v. *Commanding Officer, supra* note 10, 403 F.2d 371; *Noyd* v. *McNamara*, 378 F.2d 538 (10th Cir. 1967); *Luftig* v. *McNamara*, 126 U.S.App.D.C. 4, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967).

[72] *Fox* v. *Brown*, 402 F.2d 837 (2d Cir. 1968), *cert. denied*, 393 U.S. 1114 (1969).

[73] *Raderman* v. *Kaine, supra* note 10, 411 F.2d 1102; *Smith* v. *Resor, supra* note 10, 406 F.2d 141; *Byrne* v. *Resor, supra* note 10, 412 F.2d 774.

[74] *Wasson* v. *Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967).

[75] *Supra* note 70, 447 F.2d at 254-55.

Individual freedom may not be sacrificed to military interests to the point that constitutional rights are abolished. The military regulations in this case violate the core value of the Establishment Clause [76] and completely abolish its protection. Therefore, judicial action is mandated now.

VI.

Finally I reach appellants' claim that the attendance regulations are also unconstitutional under the Free Exercise Clause. It has already been ascertained that the academies have made some provision for excusing cadets and midshipmen for "conscientious objections." [77] However, as the Supreme Court has made clear, coercion as well as compulsion is prohibited by the Free Exercise Clause: "The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion . . . . a violation of the Free Exercise Clause is predicated on coercion. . . ." [78]

Adopting this interpretation, I cannot agree with the District Court's bald conclusions that:

> "These regulations in no way operate against a cadet in practicing his own religion or in practicing none. The individual chooses which service to attend and he chooses whether to participate and worship or not. And for sincerely held reasons he can be excused from attendance." [79]

It bears emphasis that the fact that attendance at the

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[76] *See* pages 11-12 *supra*.

[77] *See* note 5, *supra*.

[78] *School District of Abington Township* v. *Schempp*, *supra* note 6, 374 U.S. at 222-223.

[79] *Anderson* v. *Laird*, *supra* note 7, 316 F.Supp. at 1091.

military academies is voluntary does not eliminate the possibility of coercion.[80] Since there is no difference between requiring attendance and requiring worship,[81] the District Court's reference to the freedom "to participate or worship or not" is misleading. A single reading of these regulations reveals sufficient coercion to violate the Free Exercise Clause.

First, the failure to attend formal, group worship is punished like any other violation of an academy rule. The most devout believer, who may wish just once or always to worship alone is plainly coerced to attend services. The Supreme Court has recognized in *Engel* and *Schempp* that peer group pressure to conform to established prac-

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[80] In *Hamilton* v. *Regents of the University of California*, 293 U.S. 245 (1934) the Supreme Court upheld the constitutionality of the state university's requirement that all students must participate in military training against attack under the Free Exercise Clause. The Court reasoned that since the students were not *compelled* to attend the university, they were not compelled to violate their religious scruples. 293 U.S. at 262. The continued validity of this reasoning is doubtful in light of recent Supreme Court decisions, *e.g.*, *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *Torcaso* v. *Watkins*, *supra* note 43, 367 U.S. 488; *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967).

Moreover, Mr. Justice Cardozo noted in his concurrence in *Hamilton*, in which he was joined by Justices Brandeis and Stone:

> "Instruction in military science is not instruction in the practice or tenets of a religion. Neither directly nor indirectly is government establishing a state religion when it insists upon such training." 293 U.S. at 266.

Thus *Hamilton* is distinguished from this case in which the government compels attendance at admittedly religious exercises.

[81] *See* page 11, *supra*.

tices is a forceful form of coercion.[82] Thirdly, practitioners of sectarian beliefs may attend only "approved" alternatives to the academy chapels. For certain minorities, and all cadets at West Point, there are no alternatives available. Parental and chaplain approval is required for a change in attendance. And finally, visitation of a variety of religious services, thoroughly consistent with the search for or exercise of religious beliefs, is absolutely prohibited.

These manifest restraints on the free exercise of religion can be saved from unconstitutionality only if they were enacted to serve paramount and compelling state interests; and if there are no alternative means to achieve the government's goals. This dual test of constitutional validity was established by the Supreme Court in *Sherbert* v. *Verner*[83] and has been applied in this Circuit.[84] The fact that military interests are involved in this case does not make the test less rigorous.

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[82] 370 U.S. at 431 and 374 U.S. at 225.

[83] 374 U.S. 398 (1963). The Free Exercise Clause does not afford absolute protection to overt acts prompted by religious belief if the conduct poses "some substantial threat to public safety, peace or order." *Id.* at 403, citing *Reynolds* v. *United States*, 98 U.S. 145; and *Jacobson* v. *Massachusetts*, 197 U.S. 11 among others. Any burden on the free exercise of religion may be justified only "by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . .' NAACP v. Button, 371 U.S. 415, 438." *Ibid.* The Court also stated that even if in *Sherbert* there was a threat to some valid state interest, "it would plainly be incumbent upon the appellees to demonstrate that no alernative forms of regulation would [be effective] without infringing First Amendment rights." *Id.* at 407.

[84] *Barnett* v. *Rodgers*, 133 U.S.App.D.C. 296, 410 F.2d 995 (1969).

The military's interest espoused in this case has already been contrasted to "paramount and compelling" concerns which have justified infringements of personal freedoms in the past.[85] This case does not involve programs vital to our immediate national security, or even to military operational or disciplinary procedures. Nor does it appear that the ruling will have any detrimental impact on the academies' training programs. The appellees have made no showing that chapel attendance requirements are the best or the only means to impart to officers some familiarity with religion and its effects on our soldiers.

While some weight must be accorded the military judgment that familiarity with religion is necessary for the all-around officer, it is for this court to assess that decision in constitutional terms. In the words of Mr. Justice Jackson, we act not by virtue of a superior competence but by virtue of our commission to protect basic constitutional rights.[86] Absent any attempt by appellees to devise an alternative program other than compulsory attendance at the regular chapel services of a single denomination, I am not constrained to declare these regulations invalid under the Free Exercise Clause.

LEVENTHAL, *Circuit Judge*: I concur in reversal, and in the conclusion that the Establishment Clause of the First Amendment, which prohibits government

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[85] *See* page 25 *supra*.

[86] "[W]e act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed." *Board of Education* v. *Barnette*, 319 U.S. 624, 640 (1943).

measures "respecting an establishing of religion," is violated by the regulations of the various Service Academies requiring Sunday attendance at church or chapel services by cadets (a term used broadly to include midshipmen).

Although I reach the same conclusion as Chief Judge Bazelon on violation of the Establishment Clause, I do not follow the same path. As I understand it, his view is that the compulsory chapel-church attendance requirement is per se a violation of the Establishment Clause, and the justification brought forward by the Service officers and Defense Department officials is not material. Whether the chapel-church attendance regulation would be valid if it were indispensable for officer training and military survival is, for me, a more difficult question than this case requires be answered. It suffices, in my view, that an Academy regulation requiring chapel-church attendance is, at the very least, presumptively invalid as a measure respecting an establishment of religion, and that there is no showing that such an infringement of First Amendment liberties is unavoidably required on ground of military necessity. In view of this conclusion, I find it unnecessary to consider whether these regulations violate the Free Exercise Clause of the First Amendment independently of their violation of the Establishment Clause. I now amplify my reasoning, with references to the record.

1. The First Amendment provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The First Amendment respects religion as a great and important moral force in society. The religious liberty guaranteed by the Constitution embraces two interrelated freedoms: every person is assured the free exercise of his own religion (Free Exercise Clause); and every person is assured freedom from participation by the state concerning his decisions as to exercise of his religion (Establishment Clause). The Es-

tablishment Clause assures that the exercise of religion will be truly free—will be voluntary, and not imposed.

The essential requirement of voluntarism is breached by the compulsory Academy regulations.[1] Violations of these, like other, regulations are punished by reprimands, demerits, marching tours, confinement to quarters, and, for repeated violations, expulsion.

The Supreme Court's opinions have explicitly and pointedly reiterated:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.[2]

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[1] There are variations in the respective Academy Regulations concerning alternative worship services available. West Point is not located in any town, and thus cadets must choose to attend either the Catholic, Protestant or Jewish services which are made available at the Academy.

At the Naval Academy, midshipmen are permitted to attend a denominational service in Annapolis in lieu of the Academy church or chapel service. Admiral Calvert testified that at Annapolis "there are twenty-one different church parties of eighteen different denominations" which go into the city each Sunday. One of them "involves two midshipmen who simply go to a man's house for meditation . . . and it is not a regular church service."

As to the Air Force Academy, when the litigation started, chapel was waived only if a cadet attended a church in Colorado Springs approved by the Senior Chaplain. Plaintiffs assailed this approval requirement. As of May 4, 1971, the policy was stated thus, that cadets may fulfill attendance obligations either by attendance at the cadet chapel or by attending civilian churches of their choice, see fn. 5.

[2] Everson v. Board of Education, 330 U.S. 1, 15-16 (1946),

It is the Government's premise that these judicial expressions, albeit stated in plenary generality, are subject to qualification for particular instances. Accepting that hypothesis for purpose of discussion, the Supreme Court opinions establish at the very least that a government regulation requiring church attendance is prima facie invalid, a badge of religious establishment, and that it would require the strongest kind of demonstration of secularity and necessity in terms of a compelling state interest to establish its validity. Such a showing is not before us in this case.

2. To confine and define the issues of compulsory church attendance, it is important to begin with the proposition, which to me at least seems clear, that the Establishment Clause does not prohibit the Academies from providing property, facilities, and personnel in order to permit chapel and church attendance by cadets on a voluntary basis. In this voluntary context, the scope of the Establishment Clause is affected by the special position of the military and needs of its often isolated personnel, and such expenditures do not constitute an "excessive entanglement" with religion, *cf.* Walz v. Tax Commission, 397 U.S. 664 (1970). This conclusion is borne out by Abington School Dist. v. Schempp, 374 U.S. 203 (1962). Justice Clark's opinion for the Court, prohibiting a school requirement of Bible readings, reiterates the recognition in Zorach v. Clauson, 343 U.S. 306, 313 (1952), that we "are a religious people whose institutions presuppose a

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McCollum v. Board of Education, 333 U.S. 203, 210 (1948); McGowan v. Maryland, 366 U.S. 420, 443 (1961); Torcaso v. Watkins, 367 U.S. 488, 492-3 (1961).

See also, *e.g.*, Zorach v. Clauson, 343 U.S. 306, 314 (1952), where the Court said: "It [the government] may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction."

Supreme Being," notes various religious manifestations in our society, and comments (at p. 213):

> "Again, there are such manifestations in our military forces, where those of our citizens who are under the restrictions of military service wish to engage in *voluntary* worship." (Emphasis added.)

Seven justices expressly joined in this opinion, some adding their own. Insofar as the other opinions refer to the matter, they confirm that the special case of the military permits Government aid for religious worship—assuming the core element of voluntarism on the part of the attending military personnel. See 374 U.S. at p. 296 (Brennan, J., concurring); at p. 306 (Goldberg and Harlan, JJ., concurring) (recognizing the propriety of *allowing* cadets to receive exposure to religion); at p. 309 (Stewart, J., dissenting). These references focus on military chaplaincies, but I think the same considerations justify any other aid involved in making Sunday chapel available on a voluntary basis.

3. The Government, however, contends that the purpose-effect test set forth in Abington School Dist. v. Schempp, *supra*, at 222, establishes the validity of the compulsory chapel regulations because they have a secular purpose and primarily secular effect. The Government puts it that the purpose of compulsory chapel-church attendance is wholly secular, as a training program. "The sole purpose of chapel attendance is to develop in the cadets, through observation of the impact of religion on the lives of others during actual worship services, that sensitivity to religious emotion which is required of a military leader." (Br. 27).

The amicus curiae submission in behalf of religious groups terms the assertion a "shocking" claim to debase and manipulate religious worship as a mere instructional tool, and "trusts that this is but a recently derived con-

tention to seek to avoid the thrust of the First Amendment."[3]

It would be difficult on this record to sustain the conclusion that the purpose of the regulations is wholly secular. We have been asked to look at history, by the Government and the District Court ("tradition cannot be lightly discarded"). The regulations begin with an unmistakable religious premise. The 1970 affidavit of Admiral Calvert, Superintendent of the Naval Academy, sets forth:

> "1. Naval Academy records show that since the year 1853 Naval Academy Regulations have included a provision for Sunday chapel attendance by midshipmen as a regular part of the Naval Academy program for training of future naval officers. The articles for the government of the United States Navy in effect at that time charged commanding officers with the responsibility, 'to take care that divine services were performed . . . and that they cause all, or as many of the ship's company as can be spared from duty, to attend at every performance of worship of

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[3] P. 14 of brief of the General Commission on Chaplains and Armed Forces Personnel. The Baptist Joint Committee on Public Affairs takes a similar view. The General Commission sets forth its interest as follows, brief p. 2:

> The Commission was organized in 1917 by the major Protestant denominations supplying chaplains for the Armed Forces and was incorporated under the laws of the District of Columbia in 1955. The Commission is presently comprised of 35 member denominations and five additional consultative and contributing religious bodies with an aggregate membership of 60,000,000 in the United States. The Commission and its related bodies currently recruit about 95% of the Protestant clergy who volunteer for duty with the military and in veterans hospitals. The Commission functions as a delegated, permanent conference on the chaplaincy of the Armed Forces and the Veterans Administration, and on the moral and religious welfare of armed forces personnel and hospitalized veterans.

Almighty God.' Act of April 23, 1800. 6th Congress, 1st Session, 2 Stat. 45.

"The present Naval Academy Regulations are based upon Title 10 US Code, Section 6031, which states, in part, '. . . commanders of vessels and naval activities to which chaplains are attached shall cause divine service to be performed on Sunday . . .; and it is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God.'

"This statute is also implemented by U.S. Navy Regulations, Article 0711, which states, in part, '. . . the religious tendencies of individuals shall be recognized and encouraged.' "

There is likewise an unmistakable religious premise in the 1821 General Regulations for the Army which contains an Academy chapel requirement as an act of legislation.[4]

A practice is not necessarily frozen in its religious roots, as appears from the decisions upholding the Sunday closing legislation as "having undergone extensive changes from the earliest forms" and not retaining a "religious character." McGowan v. Maryland, 366 U.S. 420, 431 (1966).

In the case of compulsory chapel, however, we do not have the kind of long-standing transfer to secular objectives which characterized the Sunday closing legislation.

To some extent there have been changes that reflect a shift from compulsory to voluntary worship, as appears in the shift from the 1800 legislation, 2 Stat. 45, to the

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[4] See Art. 78 of 2 Stat. 45. See, also, art. 100:

Any cadet, who shall behave indecently or irreverently while attending divine service, or shall use any profane oath or execration, or who shall profane the Sabbath, shall be dismissed or otherwise less severely punished, according to the nature of his offense.

current version, 10 U.S.C. § 6031; and see Navy Regs. art. 0711. There is no point in pausing for the problem that the current provisions contain an outright encouragement of religious worship. The fact is that as to the compulsion, that still plainly survives, for chapel-church attendance by Academy cadets, there are references and justifications that plainly retain a religious premise, even in Academy regulations, catalogs and policy statements, issued shortly prior to the filing of this litigation in 1970.[5]

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[5] See Cadet Chapel Service, Statement of Policy, H.Q.U.S. Military Academy, 23 December 1957:

> The United States Military Academy accepts responsibility for the total development of a cadet: mental, physical, moral and spiritual. In recognition of this responsibility, the fact that biblical faith is the foundation stone of honor and integrity, and the necessity for every officer to have a first hand knowledge of one of the three great religious traditions of our country, the Academy requires all cadets to attend Protestant, Catholic, or Jewish chapel on Sunday.

The West Point catalog for the 1968-69 academic year assures that "all cadets are provided a sound basic religious atmosphere. Each cadet must attend one of the weekly chapel services—Protestant, Catholic or Jewish."

The Naval Academy catalog for 1968-69 states:

> Because we are 'one nation, under God,' it is most appropriate that the midshipmen who will some day become the leaders of our Navy should regularly attend Divine Worship Services.

The Air Force Cadet Regulation No. 265-1, promulgated on February 15, 1968 relates to Religious Program, and provides (I,b):

> b. Because a genuine sense of honor, devotion to duty, and absolute integrity are qualities demanded of an officer, and because these qualities are fostered in religious principles and traditions, the Academy requires cadets to attend Catholic, Jewish, or Protestant religious services—expressions of the three great faiths of western civilization. The Academy's religious program

In this litigation, the Government stands on the Chapel Attendance Statement adopted in 1969 by the Superintendents of the four Service Academies, which focuses on the requirement in training terms.[6] As for the mixture of religious and training premises, the Government has developed an alternative position on the appeal, that the

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fosters an atmosphere and provides instruction which together help develop the moral strength and integrity of the future officer. Further, the program provides the cadet opportunities for growth in the faith in which he was reared, and it leads him to understand the religious responsibilities of an officer who will command men of many faiths.

(1) Attendance at scheduled chapel services is considered an essential part of cadet training.

Appellants' motion to supplement the Appendix presents to us the statement of the Air Force Academy superintendent, accompanying an announcement (release of May 4, 1971) that all cadets may fulfill the chapel attendance obligation by attending civilian churches of their choice: "We're convinced of the need to expose our future Air Force leaders to religion. The power of faith and the spiritual dimensions of leadership have played no small part in the history of our country. And one is hard put to name a successful American military leader in our history who has not also at the same time been a man of deep faith."

[6] J.A. 133:

CHAPEL ATTENDANCE

1. It is the consensus of the four Superintendents that the purpose of regular attendance at religious services is to instill a sense of respect for religion as a factor in the daily lives and activities of the vast majority of mankind. It is through this respect that officers of the Armed Services can come to understand problems within their future commands which may be motivated by moral, spiritual, or ethical considerations. Regular attendance at religious services is an important part of the development and training of prospective officers of the Armed Services. It is, therefore, the general policy of the Superintendents of the Service Academies of the United

primary purpose of the chapel attendance requirement is secular, even if that is not the sole purpose, as stated by the District Court, and that this suffices for validity, assuming the effect as well as the purpose is primarily secular.

4. Accepting, for purpose of discussion, that the Superintendents' subjective purpose is now primarily secular, the objective appearance and effect of the regulations are critical in appraisal of validity, and it can hardly be gainsaid that they have substantial religious impact and consequences.

It is inescapable that compulsory chapel operates to encourage religious tendencies of cadets. Admiral Moorer conceded in his testimony (Tr. 267-271) that chapel attendance tends "to strengthen a man's religious ties" in most cases, and specifically that the requirement of attendance—over and above the course of merely making a chapel available—has "the effect of encouraging his religious tendencies."[7]

The adverse effect of compulsory chapel on religious sentiment was also the subject of evidence. The General Commission on Chaplains lauds voluntary attendance, by those who come to learn as well as participate, but opposes compelled attendance as a hindrance and inhibition of re-

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States of America that cadets and midshipmen will attend regularly scheduled religious services. It is understood that intelligent provisions must be made for bona fide cases where attendance would be in conflict with sincerely held convictions of individual cadets or midshipmen.

[7] Admiral Moorer instanced "a midshipman who attends, initially, and who has been raised by a family who did not require their children to go to church, might receive from the service, some inspiration, some motivation of his belief that would create in him a desire to be more active in the church." (Tr. 268).

ligious worship by those seeking a meaningful and devout relationship with their God and fellow believers. This was the thrust of testimony at the trial by various ministers.[8] The testimony of cadets and chaplains presents in the record the development of resentment, hostility and cynicism toward religion engendered in cadets subject to the chapel requirement. The position of the General Commission on Chaplains is before us not only in amicus curiae memorandum (*supra*, note 3), but in the testimony of its deputy secretary, Reverend A. Ray Applequist. He testified that in 1964 the Commission considered the subject of compulsory chapel attendance, because of growing opposition and concern from cadets and church leaders, and the adverse effect on recruitment of Protestant chaplains. The Commission prepared on behalf of its 35 member denominations a position paper against mandatory attendance, and petitioned the Defense Department to drop the mandatory requirement. Reverend Applequist further testified, from his experience as an Army chaplain, concerning Academy officers who declined to attend chapel after graduation, explicitly stating they had been adversely affected by the experience, as characterized by one, of "having religion rammed down my throat for my four years at the Point." However the Government's witnesses, like Admiral Moorer, were not familiar with any such problem of weakening of religious ties.

The District Court acknowledged the "forceful testimony" adduced by plaintiffs as to the generally negative effects of compulsory attendance at worship services, and the testimony that mandatory attendance will have some religious effect on some of the cadets, but stated that

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[8] Reverend Glyn Jones, Baptist minister with over 23 years of service as a Navy chaplain; Father Robert Drinan; Rabbi Eugene Lipman; Reverend Dean Kelly, of the National Council of Churches.

"plaintiffs failed . . . to demonstrate the effect is anything but slight, insubstantial and non-extensive." The District Court cited that the regulations provided that a cadet may be excused from attendance for sincerely held reasons or beliefs. Such excuse, even if readily available, would not negative the existence of a religious practice forbidden by the Establishment Clause, see Abington School Dist. v. Schempp, *supra*, 374 U.S. at 224-225.

Moreover, it is plain that the excuse provision does not in fact mitigate the rigidity of the compulsory requirement. It is available only to a cadet able to prove "beyond any reasonable question of doubt" that chapel attendance would be "counterproductive," as interfering with his awareness of the effect of religion on others. (Tr. 79; Assistant Secretary of Defense Roger Kelley.) It is not sufficient that the cadet does not believe in a Supreme Being, or that he feels that mandatory chapel attendance violates his conscience or inhibits his moral development. No cadet has ever been excused at West Point, and four cadets who sought to be excused in 1969 were called "troublemakers." At the Naval Academy, there were three excusals in the past 40 years. The rigidity of the attendance requirement is underscored by the policy concerning transfer from one church or chapel service to another: the cadet must get the permission of both chaplains, and the permission of his parents, at least if he is under 21, and must demonstrate a sincere desire to affiliate with the stated denomination.

5. When a practice, like compelled church attendance, is religious in general significance, as well as origin, and the defense is put that a particular context marks an exception where the practice is secular, the conclusion that the particular compulsion is permissible requires an extraordinary showing. No such showing has been made as to compulsory chapel at the Academies. The badge of religious establishment has not been swept away; the re-

ligious characteristic has not been shown to be a mere "vestige," or a mere "ceremonial" feature devoid of any meaningful religious impact.

The conclusion that compelled chapel attendance must be considered as retaining a substantial religious character does not necessarily end the case. The question arises whether the government's use of a practice that bears a religious impress is saved from unconstitutionality because of an overriding state interest in effective training of its military officers. That is the nub of this case, as I see it. For the government to invoke this possibility of justification it must show the clearest kind of imperative, and lack of alternative, for the "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice."[9] The burden on the government is at least as great as when it offers a secular justification to deny a claim under the First Amendment right of free exercise of religion, and there the Court has insisted that there must be more than a showing by the Government of a rational relationship to a state interest, there must be a showing that the governmental interest is "compelling", and "that no alternative" measures are available that could be used "without infringing First Amendment rights." Sherbert v. Verner, 374 U.S. 398, 406-07 (1963); *cf.* Shelton v. Tucker, 364 U.S. 479, 487-90 (1960). The government action is unconstitutional unless it is "necessary" to promote a compelling governmental interest.[10] That burden persists under the formulation that there must be no "excessive" entanglement with religion.[11]

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[9] See Justice Brennan concurring in Abington School Dist. v. Schempp, *supra*, 374 U.S. at 365.

[10] Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[11] Walz v. Tax Commission, 397 U.S. 664, 674 (1970).

The government simply has not made the required showing that its interference with religious freedoms is compelled by, and goes no further than what is compelled by, the effective training of military officers needed for survival.

a. The concept of government necessity is undercut by the fact that approximately 95% of the Service officers do not graduate from the Academies,[12] and have never been subject to this compulsory chapel requirement.

The District Court made reference to the interest in the training of "the key reservoir of officer talent" as effective combat leaders. Apart from generalities, the only specific testimony in the record on this point was Admiral Calvert's reference (Tr. 7-8), from experience, to the occasional need for commanding officers to conduct religious exercises, on the eve of battle. The official position is not premised on this need for a surrogate-chaplain, notwithstanding its emotional tug, presumably in recognition that it proves too much, and ultimately calls for the service of someone steeped in religion. Only a limited training would be needed to ensure a relatively simple service by a secular commanding officer; secular judges have been able, with general experience and without special training, to conduct often eloquent marriage services.

If we move toward a religious-type comfort to men under stress, or to "sensitivity" awareness, as a compelling imperative, neither judicial notice nor the record establishes how this can be at the same time required for Academy graduates and not for the bulk of the officers, including those closest to the men. In certain respects,

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[12] The essence of this conclusion is not negatived by the fact that the 95% figure requires adjustment because Academy graduates account for a disproportionate percentage of combat officers, and stay in service longer.

Academy graduates can set the standards for the entire officer corps. But if there is truly an imperative need for Academy officers to obtain sensitivity training through personal observation of worship, they could not pass it along to non-Academy officers who have not had such observation.

The long-standing restriction of the chapel attendance obligation to Academy graduates seems to me a powerful demonstration that it is not a necessity in the making of an officer. And constitutional doctrine will not support an infringement of religious liberty except on a showing of unquestioned and imperative necessity.

b. The church leaders and groups opposing compulsory chapel made it clear to the Defense Department that they shared its objectives of enhancing officer sensitivity to the religious wellsprings of servicemen, but believed these did not require the overriding of the voluntarism essential to the vitality of religious life, and could best be achieved by focusing on strong programs encouraging voluntary attendance at chapel and church services and by providing a regular place in the training schedule, including formal instruction, for the overall achievement of the "vital concerns" of the training objectives.[13] The significance of this viewpoint is underscored by the fact that it does not reflect an attitude of implacable opposition to any and all involvement of the military in religious matters; these groups approved the military's maintenance of chaplaincies and places of worship as necessary to pro-

[13] *E.g.*, the Oct. 1964 statement authorized by the Executive Committee of the General Commission on Chaplains (Plf. Exh. 36) and the United Presbyterian Report on the Military Chaplaincy May 1965, adopted by the 177th General Assembly of the United Presbyterian Church, U.S.A., reprinted in Church, State and Chaplaincy (ed. A.R. Applequist, 1969), Plf. Exh. 38, at 44.

vide religious services sought by military personnel on a voluntary basis.

The deciding officers did not accept that suggestion. Admiral Moorer testified on direct that he felt that classroom instruction in comparative religion, religious beliefs and moral values, would be "artificial." The record discloses, however, that such courses have been given at the Air Academy, and that the Superintendent of the Naval Academy testified that in his view coursework "might be more effective in some ways." [24] But the officers concluded, to quote Admiral Moorer's testimony, that it was preferable to permit observation "in a real world, so to speak." While the District Court did not discredit the testimony and views of church leaders and groups, it stood them on a lower rung. "As moralists the Court must accord them due deference, but in matters military the Court feels constrained to look to the military experts. . . . To accomplish the end involved—the complete training of future military leaders—it is the judgment of military experts that secular means would not suffice."

The fact that the judgment of the District Court is

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[24] See Tr. 9:

> "It is my opinion, based on my experience which I have had over some 30 years of experience in the Navy, that [compulsory chapel attendance] is the best way to produce an understanding of the Judeao-Christian principles that really are at the basis of much of Western Civilization as well as American.
>
> "Now, it is true that teaching these things at the Naval Academy in regular courses might be more effective in some ways, but I am sure the Court realizes the objections that might be raised to the teaching of religious courses at the Naval Academy as such.

He clarified that he was not referring to constitutional questions, but to what might be "approved by higher authority as part of our curriculum" (Tr. 10).

couched in terms of a finding cannot be determinative of the outcome of a constitutional litigation requiring an appraisal of fundamental values. That is demonstrated by the decision declining to sustain a district court determination that the Sunday closing law reflected no secular interest. Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961).

The District Court failed to take into account that what is involved is necessarily a composite, and not a purely military judgment. Concerning the training of men to understand the religious sentiments of others, educators, psychologists and church men would seem to have significant standing. In essence, all that is shown on the record are conclusory opinions of military officers. These simply do not suffice for the extraordinary showing of military necessity that is required for justification to override religious freedoms.[11]

c. If a practice is to be upheld as secular, it must be

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[11] The record does not indicate either that the military officers gave any consideration to the concern that they might be unwittingly perpetuating the leaning of a system religious in origin, a system that might tend and have tended to attract officers of a religious turn of mind; or that, prior to adopting the imperative of a chapel attendance requirement of the duration, rigidity and intensity reflected in this record, they made a full-scale inquiry, and obtained the insight of, *inter alia*, educators and psychologists. The limited input preceding the "educational" reorientation of the chapel program is suggested by the testimony of Admiral Calvert of the Naval Academy indicating he was not even aware of the existence or values of the comparative religion course given at the Air Academy (Tr. 132). A broader inquiry and perspective may well have developed significant indications that such educational benefit as is available from personal observation would be enhanced by abandoning the kind of chapel requirement in effect, and by structuring a curtailed observation program in the context of a patently secular course.

confined, under strict safeguards, so as to insure wholehearted secularity of purpose and thrust. That is plainly not the case of the regulations brought before us.

Thus, there is no substantial justification of the necessity of what may be characterized as the "intensity" requirement of the regulation—which prohibits the cadet from attending the services of more than one religious group. This structure is particularly hard to comprehend in view of the claim that the purpose of the regulation is to inculate awareness of the sentiments of others, the men they will command, rather than to inculate religious feeling in the cadets themselves.[16] In the absence of necessity, this insistence on attendance at a single church is an "excessive entanglement" with an established religion. This point is underscored by the testimony of Assistant Secretary of Defense Roger Kelley, who was asked why cadets should not go to services of all three religions or more. He replied that this was a good question, and he tended to believe the greater exposure would enhance a cadet's understanding, but this was not administratively feasible.[17] There may be elements of administrative convenience in denying leave to attend different places of worship, but

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[16] The standard that prohibits a cadet from changing from the church of his youth unless he desires sincere affiliation relegates his knowledge of other religions to hours plucked from holiday or free time, since he is not permitted to attend regular Sunday services. The requirement that the cadet obtain the consent of both ministers and his parents (at least as to cadets under 21) contrasts with the government argument that the cadet may be subject to greater compulsion than school children because of his maturity.

[17] See Tr. 89-90. He focused on the constraints of time. He did not specifically indicate why freedom to attend more than one place of worship could not be permitted in lieu of, as part of, some compulsory chapel.

administrative convenience does not loom large as an imperative requiring such intensity of church requirement.[10]

The approach of the military officials seems permeated with a sense of tradition, which is laudable, but not a justification for disregarding First Amendment considerations, and by an attitude that the cadets have no "right" to attend the Academy, a view which fails to appreciate that they do have a right to be free of unconstitutional requirements, and to be entitled to attend the service academies, assuming they are qualified and duly selected, without being subject to unconstitutional conditions.

The Government asks us to engage in a kind of repair carpentry, to sever out any particular aspects of the regulation deemed constitutionally objectionable. The problem is deeper than that. The court must take the regulations and practice as they are, not as they might have been. As they stand, they are marked by religious character and impact not shown to be unavoidable and imperative. They are a violation of the Establishment Clause.

MacKinnon, *Circuit Judge*, dissenting: Each religion clause[1] case seems to turn on its unique facts and to in-

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[10] While administrative considerations may loom larger for officers and men not affiliated with the three primary religions, it is not without significance that the Academy regulations seem to be oblivious to their problem. Even creeds like Humanism or Rationalism, which profess no belief in a Supreme Being but represent a set of firmly held moral and ethical convictions, are an important part of the moral fabric of our pluralistic society. Compare United States v. Seeger, 380 U.S. 163 (1965). There is no indication in the record of an approach to the problems of officers' training that takes into account the needs of soldiers who must face times of stress without the support of the doctrines of the three most prominent religions.

[1] The First Amendment provides: "Congress shall make no

volve the interplay between different principles; this case is no exception. The majority opinions, however, seem to me to apply the decisional language of the prior cases in a manner which does not fully consider the unique factual situation which confronts us here. I have no criticism of their quoted references to prior holdings, or of their statements of the general principles that have been considered to be controlling in other cases. They do, however, overemphasize the controlling effect of the constitutional provisions they rely upon. This overemphasis is their principal error as I see it. One of the opinions also further extends such conclusions to impermissible limits by claims of "per se violations" and "presumptions of invalidity" that tend to substitute assertion and characterization for logic. I find that their analysis, which fundamentally is based on an absolutist approach to the First Amendment, does not furnish a basis for a proper decision of this case.

It is my basic conclusion that the chapel attendance regulations of the academies are within the military power of the United States Government as recognized by the Constitution, and that the First Amendment does not require a different conclusion. The majority opinions overly stress the application of the First Amendment and seem almost to fail to recognize the Nation's inherent military power; they apparently assume that the First Amendment has overriding supremacy. In doing so they fail to give adequate recognition to the basic power, recognized in the Constitution, under which the armed services educate and train the Nation's future military leaders. I find in the Constitution both a recognition of the military power and the guarantees of freedom of religion, and I believe that these two provisions must be interpreted together.

In approaching the task of accommodating these con-

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law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

stitutional provisions, there are many factual similarities to previous cases involving the religion clauses of the First Amendment. We are involved, once again, in exploring the relationship between student and school albeit we are here dealing with higher education and not secondary schools where attendance is compulsory and the pupils are of tender years. We must deal with the traditional problems posed by the educational institution's assumption of responsibility, *in loco parentis*, for the physical well-being as well as the moral and intellectual development of the student, while acknowledging the deference we owe to the essentially contractual relationship between the more mature college-age student and his institution.[2]

However, the overriding factual difference in this case derives from the crucial role these educational institutions play in our military establishment. Unlike civilian and secular institutions, which are properly concerned only with the physical and intellectual development of their students, moral and character development are vitally important objectives of the service academies whose function is to prepare young men for assuming the grave responsi-

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[2] College authorities stand in *loco parentis*, concerning the physical and moral welfare and mental training of pupils. Gott v. Berea College, 156 Ky. 376, 161 S.W. 204, 206 (1913). The relationship between a private college and a student is basically contractual. University of Miami v. Miltana, 184 So. 2d 701, 704 (Fla. 1966); John B. Stetson University v. Hunt, 88 Fla. 510, 102 So. 637, 640 (1925) and cases cited; Barber v. Trustees of Bryn Mawr College, 279 Pa. 121, 122 A. 220 (1923); 14 C.J.S. *Colleges and Universities* § 24 p. 1358 (1939). While many of the features of the relationship between the cadets and the service academies are prescribed by statutes and regulations, the relationship is one for military service of a definite character and has certain contractual overtones as well, much the same as enlistments in the armed services. *See* WINTHROP, MILITARY LAW AND PRECEDENTS 545-47 (Reprint 1920).

bilities of military leadership.[3] In the judgment of those military commanders who have been most closely involved with this training through the years, some minimal *exposure*[4] *to religion*—a force of major importance in the lives of many of the men they will be asked to command—is an absolute necessity in the academies' program of moral and character development.

This major factual distinction makes it impossible to consider this case as merely a sterile regulation requiring a group of people to attend religious services. These regulations must be examined through the overlay of their importance in properly effectuating the constitutionally recognized power of the armed services to train the necessary personnel to adequately defend this Nation. It is my view that no violation of the First Amendment results from the conflict between such power, as reflected in the academies' curricular requirement to attend chapel services for one hour each week,[5] and the necessity of observing religious practices to the moral development of our future military

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[3] The military academies present a four-year course of undergraduate study in a highly regimented atmosphere of order and discipline. From the time a cadet or midshipman enters the academy his personal life as well as his school life is under academy control. His entire day follows a prescribed schedule. The educational and training program places great emphasis on developing character and qualities of leadership so that each cadet and midshipman will lay the groundwork for a career not just as an officer but as a future military leader. Since their founding, the military academies have produced practically all our great military leaders. While the military academies produce only about 5% of the total officers it is a fair estimate that graduates of the three military academies constitute 90% of our highest military officers. It is not to be assumed that every officer meets the necessary requirements of a military leader.

[4] A very minimal exposure is all that is involved in the regulation.

leaders. Several additional factors particularly aid me in reaching the conclusion that the First Amendment effects of the chapel attendance requirements are *de minimis* at best, and are clearly overriden by their importance to the proper training of our military leaders: the religious exposure required is to the family religion of the individual cadet or midshipmen; the parents are consulted as to any problems that arise;[6] the regulation is fully disclosed to applicants prior to their entering the academies;[7] *attendance* only at chapel, and not participation is required;[8]

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[5] The Air Force Academy exempts first classmen (seniors) from mandatory chapel.

[6] The strong role of the family in the religious activities and education of their children was recognized in Wisconsin v. Yoder, —— U.S. ——, 40 U.S.L.W. 4476 (U.S. May 15, 1972), and in Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[7] *E.g.*, the catalogue of the Military Academy (Ex. B. p. 76) states: "Each cadet must attend one of the weekly chapel services—Protestant, Catholic, or Jewish."

[8] The 1969 Record of Proceedings of the Conference of Superintendents of the Academies of the Armed Forces states:

> It is the consensus of the four Superintendents that the purpose of regular attendance at religious services is to instill a sense of respect for religion as a factor in the daily lives and activities of the vast majority of mankind. It is through this respect that officers of the Armed Services can come to understand problems within their future commands which may be motivated by moral, spiritual, or ethical considerations. Regular attendance at religious services is an important part of the development and training of prospective officers of the Armed Services. It is, therefore, the general policy of the Superintendents of the Service Academies of the United States of America that cadets and midshipmen will attend regularly scheduled religious services. It is understood that intelligent provisions must be made for

belief or non-belief is not imposed;[9] and those who have a bona fide objection to attending services on grounds of conscience may be excused.[10]

I. The Military Power of the National Government

The Constitution provides that Congress shall have power "to raise armies . . . to provide . . . a navy [and] to make Rules for the Government and Regulation of the land and naval forces."[11] These enumerated powers necessarily imply the power properly to train the necessary personnel.[12] This must include the power and authority to specially train a select group of officers in order to guarantee that our Nation will not want for qualified military leaders in the future. Congress has delegated this training responsibility to the various armed services;[13] and students at the academies are members of the armed forces.[14]

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bona fide cases where attendance would be in conflict with sincerely held convictions of individual cadets or midshipmen.

Pl. Ex. 10, p. 32.

[9] *Id.*

[10] *Id.*

[11] U.S. Const. art. I, § 8, cl. 12, 13, 14. It was not necessary to insert these powers in the Constitution to vest the national Government with such power but rather to designate that Congress alone and not the President can raise armies. II Story, Commentaries § 1187 (4th ed. 1873). The Constitution places no express limitations on the military power. It is an inherent power of any nation.

[12] "A constitutional power implies a power of delegation of authority under it sufficient to effect its purposes." Lichter v. United States, 334 U.S. 742, 778-783 (1948).

[13] 10 U.S.C. §§ 3012, 5012, 8012 (1970). Command and supervision of the academies is provided for by 10 U.S.C. §§ 4334 (Army), 9334 (Air Force) (1970).

[14] Cadets and midshipmen are subject to the punitive articles of the Uniform Code of Military Justice (Articles 77

The unfettered power to raise armies and provide a navy was recognized in the original Constitution and the power was conferred on Congress rather than the Executive. Of necessity, because of the strong purpose it serves, it is a great power. Its existence was recognized in the Constitution prior to the adoption of any of the Constitutional Amendments, and several decisions indicate that a number of the Constitutional Amendments are not strictly applicable to the military.[15] Most of these de-

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through 134) and have continuing military obligations. *Cf.* 10 U.S.C. §§ 516, 4348b, 6959b, 9348b (1970); UNITED STATES DEPT. OF DEFENSE, MANUAL FOR COURTS-MARTIAL ¶ 16a, at 212 (1969 Rev. ed.) (hereafter cited as MANUAL FOR COURTS-MARTIAL).

[15] In Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857), the Supreme Court held that the military provisions of the Constitution authorize Congress to provide for the trial and punishment of military offenses in the manner then and now practiced by civilized nations without any connection between such power and the Third Article of the Constitution defining the judicial power of the United States. "The two powers are entirely independent of each other." Thereafter, Chief Justice Chase in his concurring opinion in Ex parte Milligan, 71 U.S. (4 Wall.) 1, 137-138 (1866), remarked:

> It is not denied that the power to make rules for the government of the army and navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time.
>
> Nor, in our judgment, does the fifth, *or any other amendment*, abridge that power. "Cases arising in the land and naval forces, or in the militia in actual service in time of war or public danger," are expressly excepted from the fifth amendment, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and *it is admitted that the exception applies to the other amendments as well as to the fifth.* (Emphasis added)

It has become well settled that the right to trial by jury guar-

cisions relate to criminal proceedings and the legal principles upon which they are based may have only a limited

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anteed by the Sixth Amendment is not applicable to trials by courts martial or military commissions. Whelchel v. McDonald, 340 U.S. 122, 127 (1950); *cf.* Kahn v. Anderson, 255 U.S. 1, 8-9 (1921); Ex parte Quirin, 317 U.S. 1, 40-41 (1942). Easley v. Hunter, 209 F.2d 483, 486 (10th Cir. 1953) states:

> *It has been indicated in a number of cases that the power of Congress in the government of the land and naval forces of the United States are not affected by any of the constitutional amendments.* Hiatt v. Brown, supra; Johnson v. Eisentrager, 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255; Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3; Ex parte Milligan, 4 Wall. 2, 71 U.S. 2, 138, 18 L.Ed. 281. (Emphasis added.)

This may be an overstatement of the law. Those cases related to essentially criminal matters. A more accurate statement may be that the amendments do not literally affect the judicial powers of the land and naval forces, but the military's judicial tribunals for a long time were generally considered to be required to comply with the spirit of such amendments. *See,* as to the Sixth Amendment right to counsel, WINTHROP, *supra* note 2, at 165 n.38; right to confrontation of witnesses, *id.* at 287 n.27; prohibition against excessive fines and cruel and unusual punishment, *id.* at 298.

The Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*, has subsequently provided more recognition for some of these constitutional guarantees: *e.g.*, Art. 31 prohibits constitutional self-incrimination; Art. 49 authorizes use of depositions thus minimizing the guarantee of witness confrontation; and an accused is given a right to counsel of his own choice, with some exceptions, MANUAL FOR COURTS-MARTIAL ¶ 48. However, the statutory nature of these enactments with respect to these basic constitutional guarantees is a recognition of the special status of the military with respect to some of these matters. It may well be that the constitutional power in Congress to provide for the government and regulation of the land and naval forces furnishes more support for the conclusion expressed in this opinion than I

application to First Amendment rights,[16] but they do indicate the posture of the Nation's military power as recognized by the Constitution. *In any event it is clear that the First Amendment is not fully applicable in the armed*

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have afforded it. Certainly, when such power was conferred on Congress in the original Constitution, it was not subject to any religious restriction whatsoever. *See* nn. 16, 17, *infra*.

[16] At one time Article 52 of the Articles of War "earnestly *recommended* to all officers and soldiers diligently to attend divine services." WINTHROP, *supra* note 2, at 656, comments on this provision as follows:

> THE RECOMMENDATION. The Article, in its first clause, differs from the corresponding British article, from which it was directly derived and which *requires* attendance at divine worship, in *recommending* only such attendance; a difference doubtless growing out of the provision in our Constitution, by which Congress is forbidden to make any "law respecting an establishment of religion or prohibiting the free exercise thereof." A statute making it obligatory upon *officers or soldiers* to attend religious services on Sunday (or other day) would be of doubtful constitutionality, *as opposed to the spirit if not to the letter of the organic law*. The Article, therefore, while favoring such attendance, has well left it optional with officers and soldiers whether they will or not be present at any such services. (Emphasis added) (footnotes omitted)

The First Amendment to the Constitution was submitted to the legislatures of the several states on September 25, 1789 by the first Congress to meet under the United States Constitution. Ratification by three-fourths of the states was completed on December 15, 1791. Subsequently, in 1799, when there were still a number of members in Congress who had submitted the First Amendment to the states, and after the amendment had been adopted and its provisions were fresh in the public mind, Congress in the Act for the Government of the Navy required that:

> The commanders of the ships of the United States, having on board chaplains, are to take care, that divine service be performed *twice a day*, and a *sermon preached*

services. The 1800 statute, *supra* note 16, was mandatory and exceeds the present academy regulations. It required that all Navy commanders "*shall . . . cause all,* or as many of the ship's company as can be spared from duty *to attend* at *every* performance of worship of Almighty God." This indicates that contemporary opinion in Congress, when the First Amendment was fresh in the public mind, was that such a religious attendance provision was not considered to be violative of the religious clauses. In addition, it is certain that the right of free speech is properly subordinated to necessary order and discipline in the armed service, the right of assembly is principally exercised at the call of a bugle, and the right of free exercise of religion is not absolute where military necessity or facilities make it difficult or impossible to recognize. It could be strongly argued that the Chaplain Corps and service chapels would violate the Establishment Clause if that clause were not modified by the Free Exercise Clause and by the military power which is recognized in the Constitution. These religious facilities are saved by reading the

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on Sundays, unless bad weather, or other extraordinary accidents prevent. (Emphasis added.)

Act of March 2, 1799, ch. XCIV, 1 Stat. 709. This act passed both houses without objection, and *without even a roll call vote* (House Journal, Feb. 25, 1799, p. 491; Senate Journal, Feb. 27, 1799, p. 597). In the Senate the bill was recommended by a committee of three, including Senator Goodhue of Massachusetts, who served when the Bill of Rights was submitted. Senator Goodhue was chairman of the committee.

In 1800 Congress replaced the above provision with a stronger one, providing:

> Art. II. The commanders of all ships and vessels in the navy, having chaplains on board, shall take care that divine service be performed in a solemn, orderly, and reverent manner twice a day, and a sermon preached on Sunday, unless bad weather, or other extraordinary accidents prevent it; and *that they cause all, or as many*

military and religious clauses together.[17] Each clause has a certain area in which it is supreme, and where they overlap we must seek accommodation. Neither can be completely absolute. In so interpreting their provisions, I would conclude that the military power recognized by the Constitution authorizes the academies to include the chapel attendance requirement in their curriculum as a *necessary* part of the academies' training, and that such minimal regulation does not violate the First Amendment to the Constitution.

II. The First Amendment

It is clear beyond the need for restatement that absolute separation of church and state is not compelled by the Constitution. Virtually all of the recent cases involving the religion clauses deal with the permissible limits of governmental involvement with religion. The Establishment and Free Exercise clauses pose slightly different problems, but I find the impact of these academy regulations on either clause to be no more than minimal.

A. *Establishment Clause*

In the most recent Establishment clause cases,[18] decided

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of the ship's company as can be spared from duty, to attend at every performance of the worship of Almighty God. (Emphasis added.)

Act of April 23, 1800, ch. 33, 2 Stat. 45.

[17] Welsh v. United States, 398 U.S. 333, 371 (1970) (Justice White, dissenting):

> The power to raise armies must be exercised consistently with the First Amendment which, among other things, forbids laws prohibiting the free exercise of religion. It is surely essential therefore—surely "necessary and proper"—in enacting laws for the raising of armies to take account of the First Amendment and to avoid possible violations of the Free Exercise Clause.

[18] Lemon v. Kurtzman, 403 U.S. 602 (1971) and Tilton v. Richardson, 403 U.S. 672 (1971).

last term, Chief Justice Burger alluded to the "cumulative criteria developed by the Court over many years" and spoke of "Three . . . tests . . . gleaned from our cases" to be applied in Establishment Clause cases. These are:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster "an excessive government entanglement with religion."

403 U.S. at 612-613. In my opinion the chapel attendance requirement violates none of these standards.

1. *Secular purpose.*

The record in this case admits of no other conclusion than that the sole purpose and objective of the academies in promulgating the chapel attendance requirement is secular.[19] This was the substance of the testimony presented by both the academies and the Defense Department, and the trial judge so found. The purpose of chapel attendance is to provide the best possible training for our future military leaders to enable them to acquire the necessary

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[19] The most pertinent evidence on this point was the testimony of Admiral Moorer, Chairman of the Joint Chiefs of Staff:

> The purpose, of course, is to enhance his leadership and command ability by putting him in a position where he can get a feel, an understanding of the impact of religion on the various types of individuals and so he can see this in operation; and, consequently, as he acts as a leader in later years, he will appreciate this impact that religion will have on so many people.
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> * * * * * *
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> [T]hat is the sole purpose. We are in the process of developing leaders and this is a vital part of the overall leadership package; and that is the sole purpose.

App. 51-52. Similiar testimony was given by Asst. Secy. of Defense, Roger T. Kelley.

understanding and appreciation of the religious motivations and needs of the men they command. No religious belief is forced or sought to be compelled. Attendance only is required; given attendance, any actual participation is purely voluntary.

Two objections have been raised to this contention. First, that the requirement that the cadets and midshipmen can change their chapel affiliation only with parental consent belies the general educational intent of the regulation and suggests instead an impermissible concern with the content of the religious instruction. I see nothing unconstitutional in this recognition of parental rights by those who are charged with intellectual and moral training—particularly since most cadets and midshipmen are minors [20] who are away from home for the first time. Also, the regulations recognize the cadet's individual right of conscience—regardless of age.

The second objection is the contention that some alternative means exists to accomplish this secular purpose, which would not infringe on the First Amendment's protection. Much of the record in the trial below is devoted to discussing this issue. The military leaders who are charged with the responsibility for training our future officers testified that the necessary familiarity with religion for a fully-trained officer is best implanted through observation in the religion that each officer candidate brings with him to the academy and that the necessary results could not be obtained through classroom instruction. Their

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[20] The age of minority may be changed in the near future. Newspaper accounts indicate that Maryland has already changed it. Whether the state of domicile or temporary residence would be controlling is not here determined because the matter does not turn upon the age of minority but rather upon the parent and child relationship and the influence resulting therefrom. *See* note 6, *supra*.

judgment on a matter committed to their charge is entitled to great weight. After all, throughout our history, such education and training has produced military leaders who have successfully met all the demands our Nation has placed upon them. On this issue it is much more reasonable to accept the judgment of experience than the opinions of those without any experience in the field.

In my opinion it is wholly appropriate for us to rely upon the judgment of those to whom this training is entrusted that the alternative of classroom instruction in morals, religion and ethics, is not an adequate substitute to achieve the necessary result.[21] It is all very well to state that by eliminating the chapel attendance requirement military interests "vital to our *immediate* national security" are not really at stake (Opinion at 29, emphasis added.) That is true because all our present military leaders, and those who will be for some time to come, have been properly trained in the past. How about the future?

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[21] The argument is wide of the mark that since 95% of our military officers are trained outside the academies and may not be required to attend chapel at their undergraduate institution, there is no necessity for requiring such attendance at the academies. Actually, such contention is the best argument *for* chapel attendance for the remainder. It should be made certain that some portion, albeit small, have a reasonable familiarity with the religious needs of those serving in the armed services since religion is such a strong and compelling force in our citizenry, particularly in men in combat. The fact that we have been forced since World War II to resort to auxiliary methods to train officers for an expanded military establishment, and have been unable to completely train them, does not mean that we should reduce the quality of training of our officers at the academies. Thus, Judge Leventhal's criticism that chapel attendance is not universally required for officers who come to the services from schools outside the service academies is not an argument against the *validity* of the requirement at the academies.

Should we hazard that? In my opinion we should be just as much concerned that *we* do nothing to diminish the quality of our Nation's future military leaders as our predecessors were concerned that our present leaders be thoroughly qualified.

The trial court accepted the judgment expressed in the testimony of those experts who are charged with the training of our future officers. I see no justification for supplanting that judgment with inexperienced opinions that have a lesser creditable factual support in the record.

2. *Advance or inhibit religion.*

It is clear that the regulations may have the effect of advancing or inhibiting religion to some extent. By requiring attendance at religious services the academies place their officer candidates in a position that maximizes the likelihood of participation. To those with strong religious beliefs there is little or no effect—they would attend and participate on their own. To those whose religious feelings are not so strong, religion may be advanced—they are more likely to participate than they would otherwise be. To those experiencing unfavorable attitudes toward religion the attendance requirement may inhibit religion by intensifying those attitudes. I consider these effects to be *de minimis* and to be required by the educational contract that the academies assume when they undertake the training of cadets and midshipmen to be our future military leaders. They could not ignore some minimal exposure to religion. The chapel regulation has had a long existence and it is fully disclosed to applicants prior to their admission. It is not something that is foisted upon them after they arrive at the academies. Thus, those entering the academies knowingly consent to this regulation and all the other regimentation and curriculum requirements involved in their training and education at the academies.

The fundamental requirement imposed on the Government by the First Amendment is, as Chief Justice Burger has characterized it, a "benevolent neutrality." In my view as long as that essential neutrality is maintained, and the effects on religion are as insignificant as here, where minimal attendance only and not belief is required,[22] and conscientious objectors may be excused from chapel attendance, the vital importance of the regulations to the accomplishment of the academies' training objectives demands that we sustain them here. To do so is merely an accommodation of the overlapping interests reflected by the military and religious provisions of the Constitution.

Neutrality is faithfully observed in these regulations. No better description than "neutrality" could be applied to the position the academies have taken on chapel attendance beginning with West Point in 1821.[23] The cadets and midshipmen are merely placed in a position to observe church services of their own denomination; participation is purely voluntary. Significantly, the regulations do nothing more than generally provide for carrying forward pre-existing family religious preferences of the cadets and midshipmen. For the future, I would also emphasize the absolute necessity that the academies be certain to provide for a completely fair application of that portion of their regulations which permits conscientious objectors to chapel attendance to be excused therefrom.[24] I would

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[22] In evaluating the effect of the chapel attendance regulation it must be recognized that each hour of a cadet's day is scheduled by academy regulations.

[23] Act of March 2, 1821 (3 Stat. 615) approved and adopted for the government of the Army of the United States the "General regulations for the Army" compiled by Major General Scott. Ch. XIII, 5.14. These required that all "academick officers and cadets must strictly attend . . . divine service . . . on Sundays." (Regulation 99.)

[24] Cadets and midshipmen who complain that their con-

suggest they conform to the controlling principles set forth in the paraphrase of Justice Goldberg's remarks at pages 65-66, *infra*.

The importance of the attendance regulations to the academies' training program is of the highest order, to my mind. It is in the great importance that I place on this portion of the curriculum, which is directed to building the character of academy graduates and qualifying them to understand the spiritual qualities of the men under their command, that I part company with my colleagues. I consider such training to be more important and necessary than they do. As I view the chapel attendance requirement, it is a partial guarantee that our military leaders will be aware of the moral principles that influence and guide our Nation, and that they will be cognizant of the religious needs and motivations of those who serve in the armed services under their command. To assure that our military leaders will meet these standards requires that academy graduates be conversant with religion and not ignorant of its forms or values. The academies have a compelling obligation to the Nation to see that their graduates are fully trained and that ignorance of the spiritual and moral values of our Nation and our servicemen does not occur. We do not wish to train military leaders—who will have the power *in our name* to order the destruction of cities and nations—without some assurances that they have at least been exposed to the principles of basic morality that we stand for as a nation. The stakes are too high—we should continue doing everything humanly possible to avoid future My Lais.

Practically all Americans have some religious back-

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scientious objections to church attendance are not respected may request individual relief from courts after they have processed their complaint through administrative channels of the academy.

ground.[25] When our men are mustered into the armed services, and realize they may eventually face combat duty, their interest in religion often quickens. The closer they approach combat with enemy forces the more frequently many of them seek comfort in religion. Few men face death without giving consideration to religious factors.[26] It is thus necessary to insure that our top military leaders, most of whom are graduates of our Government military academies, have a thorough understanding of the religious needs and motivations of their men. This is a vital morale factor. It has been said: "In war, morale considerations make up three-quarters of the game; the relative balance

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[25] "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[26] For example, during the Civil War in the winter of 1863-64, while the armies of the Confederacy and the Union were preparing for the battles that began with the Wilderness and ended at Appomattox, a tremendous religious revival occurred in the Confederate Army camped on the banks of the Rapidan:

> In every Confederate camp chaplains and visiting ministers erected religious altars, around which the ragged soldiers knelt and worshipped the Heavenly Father into whose keeping they committed themselves and their cause, and through whose all-wise guidance they expected ultimate victory. The religious revivals that ensued form a most remarkable and impressive chapter of war history. Not only on the Sabbath day, but during the week, night after night for long periods, these services continued, increasing in attendance and interest until they brought under religious influence the great body of the army. Along the mountain-sides and in the forests, where the Southern camps were pitched, the rocks and woods rang with appeals for holiness and consecration, with praises for past mercies and earnest prayers for future protection and deliverance. Thousands of these brave followers of Southern banners became consistent and devoted soldiers of the cross. General Lee, who was a deeply pious man, manifested a constant and profound

of manpower accounts only for the remaining quarter." [27] It is thus vitally essential to my mind that academy training continue to include this required minimal *exposure* to one's own religion in this minimal good faith attempt to accomplish these purely secular objectives. To paraphrase Justice Goldberg's concurring remarks in *Abington School District* v. *Schempp*, 374 U.S. 203, 306 (1963):[28]

> The academies must inevitably take cognizance of the existence of religion and the Court must recognize the propriety of allowing cadets and midshipmen at the academies to receive a minimal exposure to religion,

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interest in the progress of this religious work among his soldiers. He usually attended his own church when services were held there, but his interest was confined to no particular denomination. He encouraged all and helped all.

GEN. J. B. GORDON, CSA, REMINISCENCES OF THE CIVIL WAR 229-30 (1903).

[27] Napoleon I, Saint Cloud, August 27, 1808.

[28] Justice Goldberg's concurring opinion states:

> Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so. And it seems clear to me from the opinions in the present and past cases that the Court would recognize the propriety of providing military chaplains and of the teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools. The examples could readily be multiplied, for both the required and the permissible accommodations between state and church frame the relation as one free of hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other. To be sure, the judgment in each case is a delicate one, but it must be made if we are to do loyal service as judges to the ultimate First Amendment objective of religious liberty.

374 U.S. at 306.

with due allowance for those whose conscience would be invaded, so that the religious exposure will be free of hostility or favor and without undue involvement.

3. *Excessive government entanglement.*

The record in this case does not indicate that the chapel attendance requirement involves any additional entanglement of Government with religion other than that already existing by the armed services' compliance with the Free Exercise clause.[29] What is involved is nothing more than the academies furnishing the facilities and personnel (chapels and chaplains) necessary to provide military personnel with the opportunity to exercise their own religion. Even if chapel attendance were voluntary the academies would still be required to make substantially the same facilities available for church attendance. The maintenance of chapels and chaplains[30] throughout the armed services guarantees that the constitutional right to free exercise of religion will not be denied while men are serving their country. There is no showing here that these services are materially increased by the attendance requirement, or that the resulting attendance enmeshes government substantially over and above the involvement which would otherwise result from furnishing the facilities necessary to meet its obligations under the free exercise requirement.

The majority opinions do not question the constitutional

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[29] *See* note 17, *supra*, and accompanying text.

[30] Buildings may be provided for religious worship at the academies. 10 U.S.C. §§ 4354(b) (Army), 9354 (Air Force). Chaplains are provided throughout the services and at the academies. 10 U.S.C. §§ 3064, 3073, 4337 (Army), 5142, 5404, 5576, 6031 (Navy), 8067(h), 8293, 8547, 9337 (Air Force).

validity of the Chaplain Corps and the furnishing of religious facilities in the armed services. It is submitted that if it is constitutional for the Government to furnish the extensive religious facilities of chapels and chaplains for religious worship throughout the armed services, and I do not question that it is constitutionally permissible, then it is "necessary and proper'" to require that our military leaders be exposed to training sufficient to give them a minimal understanding of the religious commitment and motivation of our people.

B. *The Free Exercise Clause*

There can be no question that the knowledge and understanding of religion that cadets and midshipmen acquire by chapel attendance operates to guarantee that the right of men in the armed services to fully exercise their religion will be more fully understood and recognized when these academy graduates ascend, as they certainly will, to positions of military leadership.

III. The Effect of the Majority Decision

Judge Bazelon's opinion states:

> This case does not involve programs vital to our immediate national security, or even to military operational or disciplinary procedures. Nor does it appear that the ruling will have any detrimental impact on the academies' training programs. The appellees have made no showing that chapel attendance requirements are the best or the only means to impart to officers some familiarity with religion and its effects on our soldiers.
>
> While some weight must be accorded the military judgment that familiarity with religion is necessary for the all-around officer, it is for this court to assess that decision in constitutional terms. In the words of Mr. Justice Jackson, we act not by virtue of a superior competence but by virtue of our commission to protect basic constitutional rights.

Slip opinion at 29. The foregoing fails to consider or reflect upon the effect that deficiently trained officers can have on the personnel of our armed forces and their morale. The passage recognizes that such training is necessary, but suggests that it can be obtained by other means. There is nothing in the record to support this conclusion. The testimony of our military leaders who are charged with the responsibility of supervising our military academies was to the contrary. Trying to give a person an understanding of the moral force and motivation of religion without attending church is like trying to teach swimming without water.

However, if we recognize that some training in religion is necessary, and the majority opinions seem begrudgingly to recognize this, we have come a long way. Then the only question is whether it may permissibly be given by requiring attendance at chapel or in the classroom. In my view the United States has authority to educate its cadets and midshipmen so that they will be fully qualified to assume their place as military leaders of the Nation. If those who are placed in charge of our armed services determine that a minimum exposure to the religion of one's own choice is necessary through chapel attendance, and if our 150-year experience has demonstrated that the implementation of this policy does not result in an establishment of religion, it seems to me that we should not be swayed by the vanity of the present and the belated fears of the majority that these 150 years are an aberration of the experience we should expect. I believe this lengthy experience demonstrates that the basic guarantee of the First Amendment is not violated or likely to be violated by the chapel requirement, and I also consider that such training furnishes substantial assurance that the free exercise of religion in the armed services will be respected.[31] I accord-

[31] There has been some objection by various religious bodies to the academies' chapel attendance regulation. At the same

ingly conclude that a "sensible and realistic application of the Religious Clauses" [32] compels a finding that the chapel attendance requirement does not unduly trespass upon the establishment or free exercise provisions.

For the foregoing reasons I respectfully dissent from the majority opinions and would affirm the conclusion reached in *Anderson* v. *Laird,* 316 F. Supp. 1081 (D.D.C. 1970). I am in general agreement with Judge Corcoran's reasoning to the extent hereinbefore indicated.

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time these bodies seek to bring about a "vigorous and fruitful religious life" in the military through a *"strong religious program"* in which "participation by officers and enlisted personnel is voluntary." Pl. Ex. 38, p. 44. They would thus change the present program so as to greatly *increase* the armed forces' emphasis on religion and apply the increased program to all "officers and enlisted personnel." This suggestion proposes a substantially broader religious program than exists at the present time. It would change the policy throughout the armed forces to provide for more encouragement of religion and thus depart from the present policy of neutrality. It seems to me that the present emphasis at the academies is about right.

[32] Wisconsin v. Yoder, —— U.S. ——, 40 U.S.L.W. 4476, 4480 (U.S. May 15, 1972).

APPENDIX B

United States District Court for the District of Columbia

[Filed: July 31, 1970, Robert M. Stearns, Clerk]

Civil Action No. 169–70

MICHAEL B. ANDERSON, CADET, U.S.A., ET AL., PLAINTIFFS

v.

MELVIN R. LAIRD, ET AL., DEFENDANTS

Opinion and Order

Warren K. Kaplan, Esq., 815 Connecticut Avenue, NW., Washington, D.C., for the plaintiffs. Of Counsel: Lawrence Speiser, Esq., American Civil Liberties Union, 1424 16th Street, NW., Washington, D.C., and Melvin Wulf, Esq., American Civil Liberties Union, 156 Fifth Avenue, New York, N.Y.

Thomas A. Flannery, United States Attorney for the District of Columbia, and Joseph M. Hannon, Assistant United States Attorney for the District of Columbia, for the Government. Of Counsel: John A. McIntire, Esq., for the Department of Defense and Department of the Navy; Robert K. Weaver, Colonel, United States Army, Office of the Judge Advocate General; and C. Claude Teagarden, Major, United States Air Force, Office of the Judge Advocate General.

I. General Statement

Plaintiffs, two cadets of the United States Military Academy and nine midshipmen [1] of the United States Naval Academy, brought this suit as a class action on behalf of all cadets and midshipmen [2] at the United States Military Academy at West Point, New York, the United States Naval Academy at Annapolis, Maryland, and the United States Air Force Academy at Colorado Springs, Colorado.[3] The defendants are the Secretary of Defense and the Secretaries of the Army, Air Force, and Navy.

Plaintiffs claim that the regulations of the Academies compelling Sunday attendance at Catholic, Protestant, or Jewish chapel service violate the Establishment/Free Exercise Clauses of the First Amendment and constitute a "religious test" in violation of Article VI of the Constitution. They urge that such compulsory attendance is contrary to the Supreme Court's declarations limiting governmental actions involving

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[1] Most midshipmen were minors and appeared through the Reverend Father Robert F. Drinan as "next friend." The defendants challenged the right of Father Drinan to appear for the minors absent a showing that the parents of the minors had been consulted and consented to such an appearance. Since the Court had ruled that the action was a class action it deemed the challenge immaterial and denied the motion to strike Father Drinan's appearance as next friend.

[2] The term "cadets" is hereinafter used to include not only the cadets at the West Point and the Air Force Academies but the midshipmen at Annapolis as well.

[3] None of the named plaintiffs was a cadet at the Air Force Academy. The similarity of regulations at the three Academies and the similarity of cadet positions at each Academy brings the Air Force Academy within the confines of this suit held to be a class action pursuant to Rule 23 F.R.Civ.P. See Class Actions, Charles Alan Wright, 47 F.R.D. 169, 172, 174, 178 (1969).

religion because compulsory attendance constitutes religious proselytizing and governmental support of religion. They also urge that mandatory attendance constitutes an establishment of religion and an interference with plaintiffs' free exercise of religion. Plaintiffs seek (1) a declaratory judgment that compulsory church or chapel attendance violates the above noted provisions of the Constitution, and (2) a permanent injunction forbidding the Academies from enforcing the regulations and from disciplining those cadets involved in this court action.

The applications for preliminary and permanent injunction were heard on a consolidated basis. The Court first took testimony and heard argument on whether the plaintiffs had exhausted their administrative remedies within the Academies before filing suit. The Court ruled that adequate and effective administrative remedies were not available and hence that the exhaustion doctrine was not available as a defense. Thereafter the Court completed testimony on the merits and took the case under advisement.

For the reasons appearing below the Court holds that the regulations requiring mandatory church or chapel attendance on Sunday violate neither the First Amendment to nor Article VI of the Constitution of the United States.

II. The Chapel Requirements

There is no question that Sunday church or chapel attendance is required by all cadets attending the three service Academies.[4]

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[4] Nor is there any question that prospective candidates for the service Academies, volunteers all, are on notice as to the behavior expected of them if accepted as officer candidates—including the requirements to attend Sunday services. They are

The West Point regulation provides:

> "Attendance at Chapel is part of a cadet's training; no cadet is exempt. Each cadet must attend either the Cadet Chapel, Catholic Chapel or Jewish Chapel service on each Sunday, according to announced schedules." Regulations for the United States Cadet Corps of the United States Military Academy, Chapter 8, Section IV, paragraph 819.

Air Force regulation No. 265–1 provides:

> "Attendance at an established church service is mandatory for those Second, Third and Fourth Classmen present for duty in the Cadet area."

Part II, Chapter 15, of the United States Naval Academy Regulations states:

"1. The basic requirements concerning religious matters at the Naval Academy are:

> (a) All Midshipmen will attend church or chapel services on Sunday mornings but are required to attend at no other times."

Violations of these regulations are punished in the same manner as violations of other regulations, i.e., by reprimands, demerits, punishment marching tours, confinement to quarters, and for repeated violations, expulsion.

There are slight variations in the respective Academy Regulations concerning alternative worship services available. At West Point, all cadets are required to attend one of the three services on the academy premises, as there is no town nearby to provide other alternatives. At the Naval Academy, midshipmen are permitted to attend a denominational service in Annapolis in lieu of the Academy church or chapel serv-

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so notified through the catalogs distributed to them when they apply. It might well be argued that the cadets by their own choice have imposed restrictions on their activities at the Academies. See *Raderman* v. *Kaine*, 411 F. 2d 1102, 1104 (2nd Cir. 1969).

ice. At the Air Force Academy, a cadet may attend church in Colorado Springs which has been approved by the Senior Chaplain.

Cadets may change their regular attendance from one church or chapel service to another only after first securing the approval of the respective chaplains involved, and, if they are under twenty-one, the approval of their parents. The cadet must demonstrate a sincere desire to affiliate with the new church. Approval of requests to change chapel squads is not granted on a mere personal whim any more than requests to change muster, classes, or meals.

However, a cadet who has sincerely held convictions against church or chapel attendance itself may be excused from such attendance. It was so declared by the Superintendents of the Academies in April 1969 in a policy statement which said:

> "It is understood that intelligent provisions must be made for bona fide cases where attendance would be in conflict with sincerely held convictions of individual cadets or midshipmen." [5]

Thus when the effect on the individual cadet is opposite to that intended, i.e., when he becomes incapable of observing, assimilating or becoming involved with an understanding of the religious beliefs of men and finds himself turning away from an understanding of what their religious belief and value systems are, then he is relieved from the attendance requirement.

The requirement of attendance at Sunday services at the service Academies reaches for its origins far back into the nineteenth century. West Point established its requirement as early as 1821; the Annapolis

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[5] The Eleventh Conference of Superintendents of the Academies of the Armed Forces, Record of Proceedings, April 18, 1969 at 32.

regulation dates back to 1853; and the Air Force Academy, following tradition, adopted a similar requirement when it was organized in 1955.

III. The First Amendment

The First Amendment to the Constitution provides in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

It is urged by the plaintiffs that the compulsory chapel requirements quoted above have a purpose which advances religion and have a primary effect which in some ways advances and in other ways inhibits religion in violation of the First Amendment.

The defendants on the other hand urge that the requirement to attend is not a requirement to worship; that the purpose of attendance is purely secular and an integral part of the military training accorded to the various groups of cadets, and that its primary effect is to instill in the cadets an understanding of the religious values which can at times motivate the men who will ultimately come under their command.

The conduct of the service Academies is a military activity (perhaps in the long run the most important military activity) of the United States. It is administered by the respective military services and Secretaries and under the overall responsibility of the Secretary of Defense.

Accordingly to put the issues in proper perspective it would seem appropriate, at the very outset, to note the limitations which have traditionally guided the courts in dealing with matters military.

The Courts have always been reluctant to interfere in the management of the military services. *Orloff* v. *Willoughby*, 345 U.S. 83 (1953); *Nixon* v. *Secretary*

of Navy, 422 F.2d 934 (2nd Cir. 1970); *Raderman* v. *Kaine,* 411 F.2d 1102 (2nd Cir. 1969); *Byrne* v. *Resor,* 412 F.2d 774 (3rd Cir. 1969); *Smith* v. *Resor,* 406 F.2d 141 (2nd Cir. 1969); *Schonbrun* v. *Commanding Officer,* 403 F.2d 371 (2nd Cir. 1968); *cert. denied* 394 U.S. 929 (1969); *Fox* v. *Brown,* 402 F.2d 837 (2nd Cir. 1968); *Wasson* v. *Trowbridge,* 382 F.2d 807, 812 (2nd Cir. 1967); *Noyd* v. *McNamara,* 378 F.2d 538 (10th Cir.), *cert. denied* 389 U.S. 1022 (1967); *Luftig* v. *McNamara,* 373 F.2d 664 (D.C. Cir. 1967); *Feliciano* v. *Laird,* 311 F.Supp. 791 (E.D. N.Y. 1970); *Dash* v. *Commanding General,* 307 F.Supp. 849 (D. S.C. 1969); *Arnheiter* v. *Ignatius,* 292 F.Supp. 911 (N.D. Calif. 1968); *Rand* v. *Glezer,* 288 F.Supp. 174 (D.Colo. 1968).

The problem here facing the Court is but one facet of the age-old problem of how to balance the requirements of the military and its needs for discipline and training with the Constitutionally protected rights and privileges of the civilian society.

Mr. Justice Harlan succinctly noted in *Noyd* v. *Bond,* 395 U.S. 683, 694 (1969) that

> "In reviewing military decisions, we must accommodate the demands of individual rights and the social order in a context which is far removed from those which we encounter in the ordinary run of civilian litigation, whether state or federal."

As a guiding principle it can be said that the amount of judicial interference with the military should be limited; the amount of deference given the military in matters of discipline and training should be wide. As Mr. Justice Jackson commented:

> "[J]udges are not given the task of running the army . . . The military constitutes a specialized community governed by a separate dis-

> cipline from that of the civilian." *Orloff* v. *Willoughby*, 345 U.S. 93–94 (1953).[6]

The reason for this special treatment is the unique role which the military performs. Mr. Justice Black pointed out in *Toth* v. *Quarles*, 350 U.S. 11, 17 (1955), and it was reemphasized by Mr. Justice Douglas in *O'Callahan* v. *Parker*, 395 U.S. 258, 262 (1969) that

> "Unlike courts it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."

Judge Latimer of the United States Court of Military Appeals in a similar vein has written "that military units have one major purpose justifying their existence: to prepare themselves for war and to wage it successfully. That purpose must never be overlooked in weighing the conflicting rights of the serviceman . . . and the right of the Government to prepare for and pursue a war to a successful conclusion." *U.S.* v. *Voorhees*, 4 U.S.C.M.A. 509, 531, 16 C.M.R. 83 (1954). And in the same opinion, Chief Judge Quinn, while speaking strongly to the constitutional rights of men in uniform, pointed out that "there are differences between the civilian and military communities." *Id.* at 531.

A most forceful statement of the limitation on the judiciary when dealing with matters military comes from former Chief Justice Warren.

> "So far as the relationship of the military to its own personnel is concerned, the basic attitude of the Court has been that the latter's jurisdiction is most limited.
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> * * * * *

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[6] Mr. Justice Harlan in a separate context also has emphasized the unique position of military personnel in American society. *Carrington* v. *Rash*, 380 U.S. 89, 100–01 (1965) (dissenting opinion).

> ". . . [I]t is indisputable that the tradition of our country . . . has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. *Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.*" [Emphasis supplied] Warren, *The Bill of Rights and the Military,* 37 N.Y.U.L.Rev. 181, 186–7 (1962).

The Second Circuit, speaking to issues which parallel this case, has echoed the ideas of Chief Justice Warren.

> "*Few decisions properly rest so exclusively within the discretion of the appropriate government officials than the selection, training, discipline and dismissal of the future officers of military* . . . Instilling and maintaining discipline and morale in these young men who will be required to bear weighty responsibility in the face of adversity—at times extreme—*is a matter of substantial national importance scarcely within the competence of the judiciary.*" (Emphasis supplied) *Wasson* v. *Trowbridge,* 382 F. 2d 807, 812 (2nd Cir. 1967).

Of course it is uncontested that a member of the armed services retains certain fundamental rights notwithstanding his membership in the military. The Supreme Court has left no doubt as to the applicability of the Constitution to the Military establishment. *Burns* v. *Wilson,* 346 U.S. 137 (1953). And, as the Court of Military Appeals has said, "[T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." *U.S.* v. *Jacoby,* 11 U.S.C.M.A. 428, 431–2, 29 C.M.R. 244,

246–7 (1960). However, it is equally clear that being a member of the armed services does curtail the assertion of certain constitutional rights.[7] As Chief Judge Quinn of the United States Court of Military Appeals wrote:

> "Service in the armed forces, in both war and peace, entails substantial restriction on fundamental rights." Quinn, *The U.S. Court of Military Appeals and Individual Rights in the Military Service,* 35 Notre Dame Law, 491 493 (1960).

The Second Circuit has said, as to the rights of a member of the armed services:

> "Of necessity, he is forced to surrender many important rights. He arises unwillingly at an unreasonable hour at the sound of a bugle unreasonably loud. From that moment on, his freedom of choice and will ceases to exist. He acts at the command of some person—not a representative of his own choice—who gives commands to him which he does not like to obey. He is assigned to a squad and forced to associate with companions not of his selection and frequently the chores which he may be ordered to perform are of a most menial nature. Yet the armed services, their officers and their manner of discipline do serve an essential function in safeguarding the country. The need for discipline, with the attendant impairment of certain rights, is an important factor in fully discharging that duty." *Raderman* v. *Kaine,* 411 F. 2d 1102, 1104 (2nd Cir. 1969).

There is nothing revolutionary in concluding that one logically distinguishable group in society enjoys

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[7] *Cf.* Kester, *Soldiers Who Insult The President, An Uneasy Look at Article 88 of The Uniform Code of Military Justice,* 81 Harv. L. Rev. 1697, 1743 (1968).

more limited rights than ordinary individuals. *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968); *Meehan* v. *Macy,* 425 F.2d 469, 470 (D.C. Cir. 1968); *Ginsberg* v. *N.Y.,* 390 U.S. 629 (1968).

Nor is it revolutionary to say that First Amendment rights are not absolute. *Callison* v. *U.S.,* 413 F.2d 133, 136 (9th Cir. 1969). And although the Religion Clauses are couched in absolute terms, it is not realistically possible to have absolute or perfect separation and non-involvement. *Zorach* v. *Clauson,* 343 U.S. 306, 312 (1952). The very existence of the clauses denotes an involvement of sorts. As the Chief Justice has said, ". . . [T]here is room for play in the joints productive of a benevolent neutrality . . ." *Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970). The Religion Clauses are in effect boundaries laid out to avoid excessive entanglement.

Tradition—and the continuous public acceptance of a practice—carries weight and demands recognition. The practice of compulsory chapel at the military academies did not arise only yesterday. There is an unbroken pattern of 150 years of mandatory chapel under the eyes of the President and the Congress,[8]

[8] A Board of Visitors is constituted annually to each of the service academies. It is made up of the Chairman of the Committee on Armed Services of the Senate (or his designee); three other members of the Senate (two of whom are members of the Committee on Appropriations); the Chairman of the Committee on Armed Services of the House of Representatives (or his designee); four other members of the House of Representatives (two of whom are members of the Committee on Appropriations); and six persons designated by the President. Among their duties are to inquire into the morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, academic methods and other matters relating to the Academy. The Board is required to report to the President within sixty days after its annual visit to each academy. Title 10, §§ 4355, 9355, 6968.

the military authorities, and the public in general. Such tradition cannot be lightly discarded; and the longer its existence the greater its influence on the constitutional interpretation of the regulations involved.

As Judge (later Mr. Justice) Cardozo observed "Not lightly to be vacated is the verdict of quiescent years." *Coler* v. *Corn Exchange Bank,* 250 NY 136, 164 NE 882, 884 (1928). In the same vein is Mr. Justice Holmes' comment that "a page of history is worth a volume of logic" *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349 (1921). In a later case, *Jackson* v. *Rosenbaum,* 260 U.S. 22, 31 (1922) Mr. Justice Holmes further reiterated the force of tradition in these words:

> "[I]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."

The Court recognizes of course that long continued use cannot turn a constitutional violation into a right. However, the purpose of a statute or regulation can change over the years from "the impermissible purpose of supporting religion" to the "permissible purpose of furthering overwhelmingly secular ends." *Abington School District* v. *Schempp,* 374 U.S. 203, 264 (1963) (Brennan, J. concurring); *Walz* v. *Tax Commission, supra,* 397 U.S. at 687, fn. 8 (Brennan, J. concurring).

The Court turns now to a closer examination of the chapel attendance regulations in relation to the Freedom of Religion Clauses of the Constitution.

In *Abington School District* v. *Schempp, supra,* 374 U.S. at 222, Mr. Justice Clark set down the test to be followed in determining whether the Freedom of Religion Clauses of the First Amendment have been violated. ". . . [T]o withstand the strictures of the

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Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

The Chief Justice re-framed the issue in these words:

> "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are *intended* to establish or interfere with religious beliefs and practices or have the effect of doing so." [Emphasis supplied] *Walz* v. *Tax Commission, supra,* 397 U.S. at 669.

The most cogent testimony as to "purpose" and "effect" of mandatory chapel attendance, as might be expected, was given by those people directly charged with the training of the cadets.

Among others, the defendants called upon Rear Admiral James Calvert, the Superintendent of the Naval Academy, Admiral Thomas Moorer, the then Chief of Naval Operations and now Chairman of the Joint Chiefs of Staff, and Mr. Roger Kelley, the Assistant Secretary of Defense for Manpower and Reserve Affairs. They testified substantially as noted below.

The cadets are required only to *attend* church or chapel services and to remain attentive in keeping with the avowed purpose of the activity; they are not required to participate in the service or to worship. The choice is left to each individual.[9] There is no punishment for non-participation. The activities involved are not aimed at the cultivation of religious

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[9] When the age, maturity, and voluntary position of the individuals are considered, the problems of peer pressure and youthful minds which loomed large in the school prayer cases (*Engel* v. *Vitale*, 370 U.S. 421 (1962), *Abington School District* v. *Schempp*, *supra*, 374 U.S. 203) present no obstacle.

faith or motivation,[10] but are aimed rather at the complete training of future officers who in combat will shoulder awesome responsibilities. For this reason the young men who volunteer to become cadets submit themselves to a training program the rigors of which far exceed those of other institutions of higher learning. The Academies are called upon to educate and train as effective combat leaders these young men who represent the country's key reservoir of officer talent and who are expected to set and maintain the standards for performance and conduct of all commissioned officers. Particular emphasis is placed necessarily on inculcating a sense of duty, integrity, and moral responsibility. Experience has shown that these qualities and a sensitivity to the spiritual needs of men in times of combat crisis are essential in leading men in the face of danger. Why some men resort to religion or spiritual values as support and strength in times of extreme danger and trial must be understood by a commanding officer.

Within the overall training program of the academies the most effective method of inculcating this sensitivity is attendance at chapel or church services which provide the only opportunity to observe the impact that spiritual values have on the lives of men. It would be as inconsistent with the responsibility the Academies have to train complete combat officers to ignore this necessity as it would be to ignore the more obvious physical and tactical education.

> "One of the most challenging aspects of officership is the ability to draw out the best in the people who are subordinate to that officer's command, and the ability to draw out the best in those people requires, beyond any question,

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[10] *Cf.* Kayser, *Church and State: Cooperative Separation*, 60 Mich. L. Rev. 1, 31 (1961).

> an understanding of the spiritual value system that those people use as a basis for conducting their lives and this spiritual value system is put to the most rigorous test in military life, particularly in conditions of combat and crisis."[11]

Highly trained military leaders are essential to national security, and the understanding gleaned from chapel attendance is necessary to mold the well-trained officer. Without it a vital component of officer development would be missing causing a weakness in the fiber of the officer corps which in the long run would have a harmful effect on national security. Lectures or courses in moral guidance, comparative religion, or ethics would not achieve the same effect as attendance since the crucial element of observation would have been removed. Secretary Kelley testified:

> "The opportunity to observe others at worship is clear manifestation of the manner and the extent to which they draw upon God or a supernatural being in the conduct of their lives."[12]

Specifically as to the *"purpose"* of mandatory attendance Secretary Kelley further testified:

> "Very simply the reason for the requirement is to help the midshipmen and the cadets understand the basis of religious belief and practice on the part of other midshipmen and cadets and thus equip him for positions of leadership responsibility in later service life."

And Admiral Moorer said:

> "The purpose, of course, is to enhance his leadership and command ability by putting him in a position where he can get a feel, an understanding of the impact of religion on the various types of individuals and so he can see this in operation; and, consequently, as he acts as a

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[11] Testimony of Secretary Kelley, Tr. Vol. V at 28.

[12] Tr. Vol. V at 27.

> leader in later years, he will appreciate this impact that religion will have on so many people.
>
> * * * * *
>
> "[T]hat is the sole purpose. We are in the process of developing leaders and this is a vital part of the overall leadership package; and that is the sole purpose."

Looking to the *primary effect* (as contrasted with purpose) the Chief Justice has pointed out that the end result—the effect—must not be "*excessive* governmental entanglement with religion. The test is inescapably one of degree." (Emphasis supplied) *Walz* v. *Tax Commission, supra,* 397 U.S. at 674."

As Secretary Kelley testified:

> "The institutional judgment of the Department of Defense as to the primary effect of required chapel attendance is to develop in those required to attend chapel an understanding of the religious beliefs and the spiritual value systems of other midshipmen and cadets . . .
> "I meant primary effect of requiring attendance at chapel is to instill in a midshipman the understanding of the religious beliefs of others."

And Admiral Moorer added:

> "The primary effect is to generate in the individual a better understanding of the impact, related on the lives of men, and certainly permitting them in the future to be better leaders.
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> * * * * *
>
> "When we experience a crisis situation, different men react in different ways, and it is very

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[12] The Court of Appeals had one month earlier reached the same result in *Allen* v. *Hickel*, 424 F. 2d 944, 949 (D.C. Cir. (1970). "The question is not whether there is any religious effect at all but rather whether that effect, if present, is substantial."

> important that the commander, or the senior man on the scene of the conflict or difficulty, understands why the various men in his command will react in a different way, and why some of them find a need to resort to religion to support them in this time of extreme danger and extreme trial. And unless he understands that many people have this feeling and have this need to resort to their religious beliefs to provide strength to them in this period of crisis, he cannot properly, in my view, handle this crisis situation."

As indicated earlier the Court is prepared to and does accord great weight to the opinions and the judgment of those military experts who have the responsibility of training and developing the country's future military leaders. In the absence of any compelling testimony to the contrary, it agrees with their evaluation that the purpose of required attendance at church or chapel service is wholly secular; that it is a vital part of the overall training program designed to create effective officers and leaders by preparing them to meet all the exigencies of command. The Court also agrees that the primary effect of required attendance is secular in that it enables those who will one day hold command positions to gain an awareness and respect for the force religion has on the lives of men so as to react for the benefit of all in combat crises including the giving of spiritual counseling and guidance to those who turn to religion in such situations.

In according deference to the opinions and judgments of the military, the Court is not downgrading the testimony proffered by the plaintiffs. The plaintiffs introduced forceful testimony as to the negative effects of compulsory attendance at worship services upon mankind in general. And it is undeniable that the plaintiffs adduced testimony that the mandatory

attendance will have some religious effect on some of the cadets. The plaintiffs failed, however, to demonstrate that the effect is anything but slight, insubstantial, and non-extensive.[14] It is significant, too, that the testimony adduced by the plaintiffs was presented by persons who are not now and never have been directly concerned with the training of our military leaders. As moralists the Court must accord them due deference, but in matters military the Court feels constrained to look to the military experts.

With the foregoing testimony in mind, the Court concludes that the Religion Clauses of the First Amendment have not been breached by the chapel attendance requirement.

The Court first makes the necessary distinction between "attendance" and "worship" and holds that attendance under the circumstances in question does not constitute worship. While this distinction might be said to be slight, it is in this case crucial. As Chief Justice Burger has said, "[I]t is an essential part of adjudication to draw distinctions, including the fine ones, in the process of interpreting the Constitution." *Walz* v. *Tax Commission, supra,* 397 U.S. at 679.

The Court next finds that the purpose and primary effect of compulsory attendance cannot be said to either substantially "advance" or "inhibit" religion. The thrust is toward the complete training of a military leader. The effect of attendance is no different than the effect of other regulations which all blend together to mold the future officer. "The educational system at the service Academies is a total educational and training concept having to do with developing the whole man, the whole officer . . . There is an integration between the elements of the total system

[14] As has been noted, *supra,* a cadet or midshipman may be excused from attendance for sincerely held reasons or beliefs.

and each makes its own significant contribution to developing the whole man-officer which equips him as a leader of men." [15]

Any advancement or inhibition, any sponsorship or hostility (and the Court finds none) would only be incidental. And if only incidental, it would be insufficient to hold it in violation of the Religion Clauses. As Mr. Justice Harlan wrote, concurring in *Board of Education* v. *Allen*, 392 U.S. 236, 249 (1968):

> "I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State 'so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom,' *Abington School District* v. *Schempp, supra*, 374 U.S. at 307 (concurring opinion of Goldberg, J.), it is not forbidden by the religious clauses of the First Amendment."

This mandatory attendance requirement also meets the test for the Free Exercise Clause as laid down in *Abington School District* v. *Schempp, supra*, 374 U.S. at 223. To come into conflict with the Clause it must be shown that there is a coercive effect which operates against the individual in the practice of his religion. These regulations in no way operate against a cadet in practicing his own religion or in practicing none. The individual chooses which service to attend and he chooses whether to participate and worship or not. And for sincerely held reasons he can be excused from attendance.

Nor does compulsory chapel attendance violate the standards set down by Mr. Justice Brennan in his concurring opinion in *Abington School District* v.

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[15] Testimony of Secretary Kelley, Tr. Vol. V at 37.

Schempp, supra, 374 U.S. at 203, and restated in *Walz* v. *Tax Commission, supra,* 397 U.S. at 680. Mr. Justice Brennan held that "those involvements of religious with secular institutions" are forbidden "which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice."

The attendance requirements do not "serve the essentially religious activities of religious institutions" as their principal effect is to carry out secular purposes—the training of future military leaders. Nor do they "employ the organs of government for essentially religious purposes." To the extent that the chapel attendance requirements further secular ends, they do not advance "essentially religious purposes." To the extent that purely religious activities are benefited by the requirements, the benefit is passive. Nor do they "use essentially religious means to serve governmental ends, where secular means would suffice." To accomplish the end involved—the complete training of future military leaders—it is the judgment of military experts that secular means would not suffice. With this judgment the Court agrees.

As the Chief Justice has pointed out the Religion Clauses "mark boundaries" so as to "avoid excessive entanglement." *Walz* v. *Tax Commission, supra,* 397 U.S. at 670. The Court concludes that the involvement of these regulations with religion falls outside the boundaries. The Court accordingly affirmatively finds that church or chapel attendance is an integral and necessary part of the military training of the future officer corps, that its purpose is purely secular, and that its primary effect is purely secular.

IV. Article VI

It is also claimed by the plaintiffs that mandatory church or chapel attendance imposes a "religious test" for officers in violation of Article VI of the Constitution. Article VI reads in pertinent part:

> "No religious test shall ever be required as a qualification to any office or public trust under the United States."

As there is no case law directly in point [16] the Court for guidance looks back to the historical context in which the Article was adopted.

When the Revolutionary War began, England and every American colony with the exception of Rhode Island had an "established church" or "established religion." [17] However, by the time of the Constitutional

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[16] The Supreme Court did briefly discuss Article VI and the religious test oath in *Torcaso* v. *Watkins*, 367 U.S. 488, 490–491 (1961) but decided the case on First Amendment grounds since the plaintiff held state rather than federal office.

[17] "There were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five." *Engel* v. *Vitale*, 370 U.S. 428. See generally S. Cobb, The Rise of Religious Liberty in America (1902) and C. Antieau, A. Downey and E. Roberts, Freedom from Federal Establishment (1964).

By "Establishment" was meant any alliance between church and state which could have one or more of the following characteristics:

"1. A State church officially recognized and protected by the sovereign;

2. *A state church whose members alone were eligible to vote, to hold public office, and to practice a profession;*

3. A state church which compelled religious orthodoxy under penalty of fine and imprisonment;

4. A state church willing to expel dissenters from the commonwealth;

Convention eleven years later strong support had developed for the proposition that no person should be denied political rights because he did not share the religious beliefs of the majority.[18]

The Founding Fathers were in accord with this view and were determined that the Federal Government should have no grant of delegated power to deal with religion. Lack of delegation it was felt would remove "the fundamental power of religious establishment: the ability to control the political process through interference in the claims of conscience."[19]

However, when the Convention reached the question of granting Congress the power to establish qualifications for federal office the problem of a religious test oath arose. Such oaths had been prevelant in every colony but Rhode Island; and while there were variations in the groups restricted, most made belief in some Protestant sect a requirement.[20] New Jersey as the first colony to adopt a constitution set the example.

> "[A]ll persons professing a belief in the faith of any Protestant sect . . . shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Leg-

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5. A state church financed by taxes upon all members of the community;

6. A state church which alone could freely hold public worship and evangelize;

7. A state church which alone could perform valid marriages, burials, etc." [Emphasis supplied] C. Antieau, A. Downey, E. Roberts, Freedom from Federal Establishment, *supra*, at 1.

[18] But in only two of the thirteen states, Rhode Island and Virginia, was full and perfect freedom of religion conceded by law. S. Cobb, The Rise of Religious Liberty in America, *supra*, at 482–509.

[19] C. Antieau, A. Downey and E. Roberts, Freedom from Federal Establishment, *supra*, at 110.

[20] *Id.* at 92–110.

islature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects." F. Thorpe, American Charters, Constitutions and Organic Laws, Vol. V, at 2597 (1909).

The effect of these religious test oaths was to prevent those who did not profess belief in the established church or religion of the state from exercising the basic political and economic rights of voting, holding office, practicing a profession, or becoming an officer in the militia.[21]

It was against this background that the religious test oath was accepted by the Convention. It was based upon the Founding Fathers' fear that the power to determine the qualifications for office might carry with it by derivation or implication the power to use religion as a basis for qualification.[22] And this they wanted to prevent.

It is clear from the history behind the adoption of the clause and from the subsequent debates in the state ratifying conventions that the banning of the religious test oath in the Constitution was to keep the Federal Government from creating an established religion.[23]

Thus, from an historical standpoint there is a close connection between the establishment prohibition and the test oath prohibition. The Court having determined that there is no violation of the Establishment Clause in the mandatory attendance regulations, it necessarily follows that there can be no violation of the test oath prohibition.

Further and as a practical matter if one considers that the Academy graduates constitute less than five

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[21] *Id.* at 10–16.

[22] *Id.* at 99.

[23] Elliot's Debates, II, 149, 202; Elliot's Debates, III, 204. S. Cobb, The Rise of Religious Liberty in America, *supra*, at 508.

percent of the officer corps, it can hardly be said that the Academy regulations interpose a test which prevents others from becoming officers in the armed services of the United States. The Court accordingly finds these regulations not to be a religious test and not a violation of Article VI.

This opinion constitutes the Court's findings of fact and conclusions of law.

V. Order

In the light of the foregoing it is hereby ORDERED:

(1) Plaintiffs' motion for a declaratory judgment that compulsory chapel attendance violates the Constitution is denied.

(2) Plaintiffs' motion for a permanent injunction forbidding the Academies from enforcing the requirement, is denied.

(3) Plaintiffs' motion for a permanent injunction forbidding the Academies from disciplining the cadets and midshipmen for their involvement in this suit, is granted.

Howard F. Corcoran,
Judge.

Dated: July 31, 1970.

APPENDIX C

United States Court of Appeals for the District of Columbia Circuit

[United States Court of Appeals for the District of Columbia Circuit, filed: June 30, 1972, Nathan J. Paulson, Clerk]

September Term, 1971

Civil Action 169–70

No. 24,617

MICHAEL B. ANDERSON, ET AL., APPELLANTS

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE OF THE UNITED STATES OF AMERICA, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Before: BAZELON, Chief Judge, and LEVENTHAL and MACKINNON, Circuit Judges

Judgement

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed, and this case is hereby remanded to the District Court for

further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

Nathan J. Paulson
NATHAN J. PAULSON,
Clerk.

Dated: June 30, 1972.

Opinion per curiam.

Separate opinion by Chief Judge Bazelon.

Separate opinion by Circuit Judge Leventhal.

Dissenting opinion by Circuit Judge MacKinnon

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-653

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL.,
Petitioners

v.

MICHAEL B. ANDERSON, ET AL.,
Respondents

BRIEF OF JOHN W. MALLEY AMICUS CURIAE

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BRIEF OF JOHN W. MALLEY AMICUS CURIAE

Interest of the Amicus Curiae

I respectfully submit this brief under Rule 42 on my own behalf as a graduate of the United States Naval Academy and a citizen deeply interested in the welfare of that Institution and the United States Navy. I am a member of the bar of this Court.

I have received the consent of the Solicitor General to the filing of an amicus curiae brief and a statement by Warren K. Kaplan, Esq., counsel for Respondents

and with reference to Rule 42, that he has "no objection" to my filing an amicus brief.

The reason for submitting this brief is my belief that the Petition as well as the appeal record in the Court of Appeals below do not emphasize sufficiently the historical purposes of the Naval Academy chapel services to foster a sense of honor, loyalty and devotion to duty in Officers in their service of God and Country.

ARGUMENT

The Successful Encouragement at the Naval Academy for Well Over A Century, of the Ideals of Honor, Loyalty and the Sense of Duty in the Service of God and Country Should Not Be Lightly Set Aside, At Least on Such an Incomplete Record as This One, Considering the Devastating Nature of the Decision of the Court of Appeals.

According to the affidavit of Rear Admiral James Calvert (App. 33), the Naval Academy Regulations have included since the year 1853 a provision for Sunday chapel attendance by Midshipmen as a regular part of the Naval Academy training of future naval officers, and the Articles for the Government of the U.S. Navy at that time charged Commanding Officers with the responsibility "to take care that divine services were performed,—and that they cause all, or as many of the ship's company that can be spared from duty, to attend at every performance of the worship of Almighty God." *Act of April 23, 1800. 6th Congress, 1st Session, 2 Stat. 45.*

The historical purpose of the chapel services at the Naval Academy is to foster a sense of honor, loyalty and devotion to duty in officers in their service of God and Country. The chapel services are *not* aimed at establishing, sponsoring or supporting a religion. Un-

fortunately, the record for appeal made for the Academy is not one which sufficiently emphasizes these high purposes and their historical success.[1]

The brigade of Midshipmen is an entity, as are the organized units of all military organizations. The success of the training of Midshipmen should be judged not by the complaints of one or two or a handful of them, but by the history of performance as Officers of the graduates of the Academy taken as a whole.

The successful training of Midshipmen should not be judged and then interfered with, even in part, on the testimony of a few individuals, such as one retired Chaplain, one psychiatrist, one Jesuit Priest, one Rabbi, etc. The Naval Academy should not be hampered in its mission by piecemeal prohibitions[2] of the Courts. If the decision of the Court of Appeals should stand, is it not likely that the divine service themselves will be challenged, on the ground that the very conduct of such services violates the First Amendment? If successful, the Naval Academy Chapel would be accepted only as a museum. Would there be reason for carrying prohibitions that far? Is there any *real* reason for carrying prohibitions as far as does the present decision of the Court of Appeals?

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[1] On the other hand, the record made by the Plaintiffs-Appellants below was not one which would justify overturning a practice which had endured successfully for well over a century.

[2] I use the plural, because it seems evident from the briefs filed below, that intense feelings were involved, and if the Naval Academy is placed under a prohibition of the Courts as to one of its practices, it may be expected that other challenges of Academy authority will be inspired. Surely this was not contemplated by the prayer decision of *Abington* v. *Schempp*. 374 U.S. 203.

If the Naval Academy is to be challenged as to the manner in which it conducts divine services in the chapel or if the continued existence of the Chapel as such is to be questioned, it should be on a record which covers the whole history of the performance of the Academy in training Officers for the Navy.

In 1917, Franklin Delano Roosevelt (then Assistant Secretary of the Navy), who was an authority on Naval history, wrote a Foreword in a book by Ralph Earle "Life At The United States Naval Academy,"[3] in which he stated that the book"—gives clearly and definitely the history, the life and the aims of the greatest national institution of learning—." Of the Chapel, Ralph Earle wrote:

> "The dome at the Naval Academy Chapel is the first object that greets the eye as one approaches Annapolis either by land or sea—. Possibly it was thus planned in order to keep within the horizon of the Midshipman's life the fact of the existence of the Creator of all good—.
>
> The regular 'Official Divine Service' is held in the chapel every Sunday morning—. All Midshipmen are required to attend except—Roman Catholics, together with a few of other denominations who have obtained—permission—, to attend the service of their choice in—Annapolis—. The service is hearty and inspiring, conducing to the love of one's country and is undoubtedly of vast benefit to the Midshipmen—.
>
> The daily prayers, said after breakfast in the mess hall by the Chaplin—and the one attendance at Church on Sundays are the only compulsory features of the Midshipman's religious life. These

[3] G. P. Putnams Sons, New York and London V 415. Pl E2.

help him to realize that he is not merely an individual, but is a member of an organization—as is evidenced by the prayer for his brothers in the fleet—and by the hymn which closes every divine service commending to the care and protection of the Eternal Father, all 'Those in peril on the sea.'"

As is obvious, I have not been able to devote as much time as I would like to show how inadequate was the record which was considered by the Court of Appeals. By a visit to the Chapel, I found a few expressions recorded on the walls which indicate what kind of a record might have been considered, before making a decision as important as that which was made by the Court of Appeals.

Admiral James L. Holloway wrote a letter on Jan. 8, 1965 with regard to his tour of duty as Superintendent. He said—"The Chapel and its moving service was at once a joy and an inspiration to us. It is truly the heart of the Naval Academy, and there is no one who has seen it that is not better therefor." Another letter on the wall of one of the corridors of the Chapel, is by Vice Admiral W. R. Smedberg, III and evidently speaks of his tour as Superintendent in about 1956-1958. His letter says in part: "—to the majority of graduates at the Naval Academy, the Chapel Service has a significance which deepens with each passing year. As Midshipmen we accepted it with varying degrees of enthusiasm, but I think almost all of us were proud to have been a participant in it on graduation day.—later—many of us found ourselves drawn back to the Chapel—, finding increased pride in the acknowledgement of service to God and Country which the chapel service connotes."

A poignant note in Admiral Smedberg's letter dealt with a visit of President Harry Truman to the Chapel. The letter says: "When I followed President Truman down the aisle—heard him say as he wiped his eyes 'Every American should be privileged to attend this service.' "

Many years ago graduating midshipmen gave voluntarily as their departing gift to the Academy, a beautiful and expensive window for the Chapel, showing a young graduate in uniform which suggests to me his belief and faith in God. The window contains this inscription:

> "In Reverent Tribute to all the Sons of Their Alma Mater, who in War and in Peace Have Realized Her Ideals of Honor, Courage, Loyalty and Duty in the Service of God and Country, This window is Placed here by the Class of 1927."

I respectfully suggest that all of the above indicates the irreparable harm which may be done to the Naval Academy and the Naval Service, if the decision of the Court of Appeals is allowed to stand. Surely, the application of *Walz* v. *New York,* 397 U.S. 664, 686 is warranted, in that a practice which has stood for well over a hundred years "by common consent" should not have been overthrown on such a dubious record as this one. As stated in Justice Stewart's dissent in *Abington* v. *Schempp,* 374 U.S. 203, 319, the record is "—wholly inadequate to support an informed or responsible decision."

The danger our country faces today is the decline in spirit and morality observable among young and old alike. The Supreme Court should not let stand a decision which would weaken the Naval Academy at the point where it now needs its greatest strength.

CONCLUSION

The chapel services at the Naval Academy are not aimed at establishing, sponsoring or supporting a religion. They do recognize belief and faith in the Creator, and foster honor, loyalty to Country and devotion to duty. The practices of the Academy have contributed to the successful training of Naval officers for well over one hundred years. They should not be prohibited, especially on the inadequate record which was before the Court of Appeals below.

It is respectfully submitted that the petition for writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

October Term, 1972

MELVIN R. LAIRD,
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v.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I. RESPONDENTS' COUNTER-STATEMENT OF THE CASE

Every cadet and midshipman at the United States Military Academy and United States Naval Academy and every cadet in his first, second or third year at the United States Air Force Academy[1] is required to attend church or chapel

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[1] No explanation was ever offered for exempting seniors at the United States Air Force Academy from the mandatory chapel requirement. Presumably they are thought to be less in need of the benefits of compulsory attendance at worship than their counterparts at West Point or Annapolis.

services every Sunday morning. The regulations are unequivocal in their langugage (*e.g.*, "No cadet is exempt" . . . "All midshipmen will attend . . .") and severe penalties, including marching tours, demerits, confinement to quarters, and possible expulsion, are imposed upon violators (App. 12, 15, 19).[2]

Cadets and midshipmen are given some choice as to which worship service they will attend, but their choices are severely limited by the regulations. At West Point, a cadet must attend one of three on-campus chapel services (Catholic, Protestant or Jewish, Pl. Ex. 21, App. 138). At the Naval Academy, midshipmen may elect to attend a denominational service in the town of Annapolis (Pl. Ex. 15, App. 136), while at the United States Air Force Academy, a cadet is permitted to attend services at an "established and cooperating" church in Colorado Springs (App. 21). (See, also, App. A, p. 370, fn. 5.) Any cadet or midshipman who is able to prove "beyond a reasonable doubt" to the Academy authorities that chapel attendance would be "counter-productive" for him may be excused (Tr. 79, App. 93). At the Naval Academy, there have been three cases of such excusals in the past forty years. At West Point, no cadet has ever been excused (App. 81, 86, 123, 126-7).[3]

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[2] "App." refers to the Appendix in the Court of Appeals. References to the appendix to the Petition are shown as "Appendix A," "Appendix B," etc.

[3] Four cadets at West Point who sought unsuccessfully to be excused from mandatory chapel in 1969 were called "trouble makers" and were invited to resign from the Academy (App. 125-6). There is no evidence of how many, if any, cadets at the Air Force Academy have ever been excused.

In determining whether a cadet or midshipman has carried his burden of proof on the issue of chapel attendance being "counter-productive" for him, it is not sufficient, in the view taken by the Department of Defense that the man may be an atheist who does not believe in a Supreme Being (App. 96-7), or that mandatory attendance violates the cadet's conscience (App. 96), or that he feels that compulsory chapel attendance is inhibiting his moral development (App. 136-7).

The Academy regulations restrict the free transfer of cadets and midshipmen from one church or chapel service to another. A cadet desiring to change his place of attendance must first get the permission of the "sending chaplain," the "receiving chaplain" and his parents (App. 13, 15, 20). Regulation 1502(1)(a) of the Naval Academy provides that requests for transfers ". . . based on the mere personal whims of the midshipman, rather than a sincere desire to affiliate with the stated denomination, will not be approved." (App. 15.)

Relevant academy catalogues and other publications illustrate the fundamentally religious purpose of compulsory chapel. The objective, as stated, is to provide a "sound basic religious atmosphere" (App. 148). This objective presumably stems from "the fact that biblical faith is the foundation stone of honor and integrity." (App. 154.)[4]

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[4]Consistent with this theory is Admiral Moorer's testimony that an atheist would inevitably lack "certain qualities" necessary for military leadership (App. 101).

In his affidavit filed in opposition to plaintiff's motion for preliminary injunction, upon which affidavit petitioners rely (Petition, pp. 3, 5) General Samuel Koster, then Superintendent of the Military Academy at West Point, modified the above-quoted excerpt

(Continued)

Midshipmen at the Naval Academy are told that they must regularly attend Divine Worship Services "because we are 'one nation under God'" (App. 145). The regulations are based on Title 10 U.S. Code, §6031, which states, in part ". . . commanders of vessels and naval activities to which chaplains are attached shall cause Divine Service to be performed on Sunday . . .; and it is earnestly recommended to officers, seamen, and others in the naval service diligently to attend every performance of the worship of Almighty God" (App. 33).[5]

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[4] (Continued)

from the official statement of policy by substituting the more neutral term "moral values" for "biblical faith" (App. 30). Subsequent to the filing of this affidavit, General Koster resigned as Superintendent at West Point when he was accused of suppressing information about the mass killing of civilians at Mylai. As former commander of the Americal Division, units of which were involved in the killings, General Koster was ultimately demoted, censured and stripped of his Distinguished Service Medal for the part he played in the aftermath of the killings. New York Times, May 20, 1971, 1:4.

[5] That this purpose is well recognized by many of those who are subjected to the requirement is indicated in the *amicus* brief of John W. Malley who candidly urges that the compulsory chapel regulations be retained in that they encourage a "sense of duty in the service of God and Country" and that they ". . . recognize belief and faith in the Creator" (*Amicus* Brief of John W. Malley, pp. 2, 7 and passim).

Notwithstanding this rather clear expression of religious purpose, the principal Government witnesses at trial testified that the *sole* purpose of the chapel regulations was to enable cadets and midshipmen to observe how *others* worship, so that they might some day be able to comprehend and deal with the religious needs of their men in times of crisis (App. 93 (Assistant Secretary of Defense Roger Kelley); App. 99-100 (Admiral Moorer)). The transfer

(Continued)

The uncontradicted evidence shows that compulsory attendance at worship directly violates the expressed tenets of most of the major faiths prevalent in this country (App. 62, 64-6, 72, 115, 153-A) and has caused large numbers of cadets and midshipmen to become permanently alienated from religion by what they perceive as the utter hypocrisy of the theory and application of the regulations (App. 61-2, 63, 68, 84-5, 115, 127-8, 136). In addition, a variety of religious leaders, representing the gamut of the principal religious denominations in the United States,[6] testified that the primary effect, on balance, was one of serious harm to religion in general, and to the religious lives of the individuals concerned in particular (*e.g.*, App. 63-4, 69, 72).

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[5] (Continued)

restrictions (p. 3, *supra*) are, of course, hopelessly at odds with this secular training purpose. One would expect that transfers would be encouraged, rather than prohibited, if the goal were truly to familiarize cadets with the diverse religious backgrounds of armed forces personnel.

[6] Plaintiff's clerical witnesses included a Baptist minister with over 23 years of service as a Navy chaplain (Reverend Glyn Jones), the dean of Boston College Law School (Father Robert Drinan), a former Jewish chaplain (Rabbi Eugene Lipman), an Episcopal chaplain and professor at American University (Rev. Earl H. Brill), the secretary of the General Commission on Chaplains for Armed Forces Personnel (Rev. A. Ray Applequist), and the Director for Civil and Religious Liberty of the National Council of Churches (Rev. Dean M. Kelley).

We think it is significant that the Government produced no chaplains or other religious leaders whatever to defend the practice of mandatory chapel.

II. REASONS FOR DENYING THE WRIT

It is readily apparent from a reading of the considerations governing review on certiorari (Rule 19, Rules of the Supreme Court) that the only possible criteria which could even remotely be considered applicable to a grant of certiorari in this case are the third and fourth clauses of Rule 19(1)(b).[7] Unless the Government can plausibly contend that the legality of governmental compulsion to attend religious worship is still an open question in this Court, or that the decision of the court below is in conflict with applicable decisions of this Court, then certiorari should not be granted. Neither contention can be sustained.

Few propositions are more solidly established in the jurisprudence of the First Amendment than that the Government may not compel church attendance.[8]

---

[7] Rule 19(1)(b) provides as follows:

> Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

[8] Even those who disagree with this Court's decisions in the area of school prayers would concede that compulsory participation in religious activity is not to be condoned. *E.g.*, Griswold, "Absolute Is in the Dark," 8 Utah L. Rev. 167, 35 N.Y.S. Bar J. 212 ("I

(Continued)

In the first and most frequently cited case construing the Establishment Clause, Justice Black set forth its *minimum* scope as follows:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither can force nor influence a person to go to or remain away from church* against his will or force him to profess a belief or disbelief in any religion. *No person can be punished for* entertaining or professing religious beliefs or disbeliefs, *for church attendance or nonattendance.* . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to 'erect a wall of separation between church and state.' *Everson v. Board of Education*, 330 U.S. 15, 16 (1946) (emphasis added).

This quotation from *Everson* has been repeated and reaffirmed in several subsequent cases. *McCollum v. Board*

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[8] (Continued)

find it hard to see that there is anything wrong or oppressive in making that law applicable to all members of the community—as long as the persons who do not care to observe Sunday themselves are not *compelled* to do anything," *ibid.*, 35 N.Y.S. Bar J. at 224, 8 Utah L. Rev. at ___.) It would appear from the Petition that the Solicitor General has changed his mind since writing the above.

of Education, 333 U.S. 203, 210-11 (1947); *McGowan v. Maryland,* 366 U.S. 420, 443 (1960); and *Torcaso v. Watkins,* 367 U.S. 488, 492-3 (1960).

We think that this Court in *Everson* intended to set forth certain categories of absolutely proscribed conduct. Thus, the federal government cannot, for example, require a person to profess a belief in the divinity of Christ, regardless of what secular purpose or effect might be involved. The clear message of *Everson* is that certain limited areas, such as profession of religious belief and attendance at worship are so sensitive, so deeply personal, and so inherently relegated to individual conscience that the state cannot under any circumstances lawfully seek to compel individual conduct.[9]

During the early 1960's, the school prayer and bible reading cases brought about the realization that the *Everson* language was not sufficiently precise to evaluate certain more ambiguous forms of possible "establishment," and the Court promulgated a more specific two-fold test for analyzing those governmental practices which did not fall clearly into the category of practices prohibited by *Everson.* This test, sometimes known as the "purpose/primary effect" test, was first articulated in *Abington School District v. Schempp,* 374 U.S. 203, 222 (1962).

> The test may be stated as follows: what are the purpose and the primary effect of the

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[9] The Government's attempted distinction between compulsory attendance and compulsory worship is—as the Court below found—completely without merit. Appendix A, p. 170. The only way in which worship can possibly be compelled is through overt actions, e.g., attending when the worshippers attend, rising when the worshippers rise, and sitting when the worshippers sit. App. 128-9.

> enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion. (Citations omitted.)

In the court below, Chief Judge Bazelon held that the present case was governed by the clear and unambiguous prohibition of *Everson*, since freedom from governmental imposition of religious activity is a "core value" protected by the Establishment Clause (App. A, pp. 17a-19a). In such cases, there is no necessity for applying the "purpose and effect" test. Respondents agree with this analysis, and believe that it is dispositive of the case.

Application of the "purpose and effect" test does not alter the result. The documents cited earlier (pp. , *supra*) forcefully convey the religious purpose of the regulations—a purpose strictly forbidden under the *Schempp* test.

The most recent version of the role of compulsory chapel—*i.e.*, as a necessary secular training aid to endow cadets with an understanding of the religious backgrounds and needs of their men—is so clearly fallacious as to fall of its own weight. Not only is this stated purpose sharply contradicted by all of the pre-trial publications, but even the Superintendent of the Naval Academy was obliged to admit that a course in comparative religion "might be more effective in some ways" (Tr. 9).

The Government's contention that compulsory chapel is essential to our national security (App. 94) and is

indispensable for the effective training of military officers was carefully dissected in the court below (App. A, pp. 42a-44a) and found to be wholly lacking in evidentiary support. As Judge Leventhal has pointed out, the argument is severely undercut by the fact that 95% of the service officers do not graduate from the academies, and have never been subject to the compulsory chapel requirement.[10]

Indeed, since the filing of the Petition, it has been indicated that at least one of the affected academies has repudiated the necessity, or desirability of compulsory chapel and only reluctantly agreed to join in this petition.[11]

It is not the function of a brief in opposition to reiterate all the arguments which indicate that the decision of

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10 "The longstanding restriction of the chapel attendance obligation to Academy graduates seems to me a powerful demonstration that it is not a necessity in the making of an officer and constitutional doctrine will not support an infringement of religious liberty except on a showing of unquestioned and imperative necessity." Concurring opinion of Leventhal, J., App. A. p. 43-A.

11 "[The] United States Air Force has been quite willing to abide by the lower court's ruling to eliminate compulsory chapel. But Army and Navy apparently resisted and Defense agreed with them" *Air Force Times*, Nov. 22, 1972 (editorial). There is no reason to believe that compulsory chapel is any more essential for training cadets at West Point and midshipmen at Annapolis than for training their Air Force counterparts at Colorado Springs. Perhaps the true nature of the Government's concern was expressed by *amicus* Malley: "... and if the Naval Academy is placed under a prohibition of the Courts as to one of its practices, it may be expected that other challenges of Academy authority will be inspired." Amicus Malley, p. 3(n)

the court below was correct on the merits. These arguments are expounded at length in the opinions of Judges Bazelon and Leventhal, App. A, pp. 1a-47a. The position of the dissenting judge (which is reiterated by the Government in the Petition)—that compulsory chapel is a military necessity—is simply not supported by the record in this case.

It is ironic and disturbing that nearly two centuries after the adoption of the Bill of Rights, the department of government which is charged with defending our country and its vital freedoms now seeks to impose upon its citizens a blatantly unlawful requirement of the very sort that the First Amendment was designed to guard against (App. A, pp. 6a-10a).

The clear impropriety of the practice which the Government here seeks to defend is in no way mitigated by couching the rationale in terms of national security, as this court has recently noted in connection with an intrusion into another section of the Bill of Rights. In *United States v. United States District Court for the Eastern District of Michigan, et al.*, ___ U.S. ___, 32 L.Ed.2d 752, decided June 19, 1972, this Court rejected the Government's claimed right to conduct warrantless wire-tapping of domestic organizations, despite contentions that such electronic surveillance was essential to the national security. The language of Justice Douglas in his concurring opinion is, we submit, directly applicable to and dispositive of the case at bar:

> When the Executive attempts to excuse these tactics as essential to its defense against internal subversion, we are obliged to remind it, without apology, of this Court's long commitment to the preservation of the Bill of Rights

from the corrosive environment of precisely such expedients . . . Chief Justice Warren put it this way in *United States v. Robel*, 389 U.S. 258, 264: "The concept of 'national defense' cannot be deemed an end in itself, justifying any . . . power designed to protect such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideas which set this nation apart. . . . It would be indeed ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which make the defense of the Nation worthwhile." *Ibid.*, 32 L.Ed.2d at 775.

CONCLUSION

For the reasons stated the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 3 copies of this Brief in Opposition to Petition for Certiorari were delivered by hand to Erwin Griswold, Solicitor General of the United States, this 27th day of November, 1972.

WARREN K. KAPLAN